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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION, *Petitioner,*

v.

LONG ISLAND RAILROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the operation of a State-owned railroad, engaged in the carriage of freight in interstate commerce and the provision of long-distance commuter service, is a traditional and integral governmental function, within the meaning of *National League of Cities* v. *Usery*, and therefore constitutionally shielded from the provisions of the Railway Labor Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, United Transportation Union, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on September 15, 1980.[1]

OPINIONS BELOW

The opinion of the Court of Appeals, reported in 634 F.2d 19, and the opinion of the District Court for the Eastern District of New York, not yet reported, appear in the Appendix (hereinafter designated "App.") at 1a-26a and 29a-46a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1980 (App. 1a). A timely petition for a

[1] The Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, Brotherhood of Railroad Signalmen, Brotherhood of Railway Carmen, International Association of Machinists and Aerospace Workers, *amici curiae* in the Court below, join in the views expressed in this petition.

rehearing en banc was denied on December 17, 1980 (App. 27a). Upon application by petitioner, this Court extended the time within which to file this petition to April 16, 1981, and later, to May 16, 1981. The Court's jurisdiction is invoked under Section 28 U.S.C. 1254 (1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, and of the New York Civil Service Law, Section 200-214 (the Taylor Law), are set forth in full in the Appendix at pages 83a, 57a, and 49a, respectively.

STATEMENT

Proceedings Below[1]

This case arose out of a dispute over proposed modification of a collective bargaining agreement between petitioner Long Island Railroad ("LIRR") and petitioner United Transportation Union ("UTU"). UTU is the authorized collective bargaining representative of the LIRR train employees. LIRR is a wholly owned subsidiary of respondent Metropolitan Transportation Authority ("MTA"), an agency of the State of New York.

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[1] The proceeding below draws into question the constitutionality of the application of the Railway Labor Act, *supra*, to the respondents. Since neither the United States nor any agency, officer, or employer thereof is a party, it is noted that 28 U.S.C. 2403(a), may be applicable. So far as is known, no court of the United States has certified that such constitutionality was drawn in question herein.

On December 7, 1979, UTU filed this action in the federal district court for the Eastern District of New York for a declaratory judgment that the LIRR was subject to the Railway Labor Act; that the Railway Labor Act occupied the entire field of labor relations of railroads engaged in interstate commerce to the exclusion of state law, in this case the New York Taylor Law; and that an injunction issue to protect against Taylor Act interference with federally protected rights.

The District Court granted petitioner's motion for summary declaratory judgment. It concluded that the Long Island Railroad is a rail carrier engaged in the transportation of freight in interstate commerce and is therefore subject to the Railway Labor Act (App. 36a). Further, it held (1) that "employees of the Railroad who have exhausted the mandatory bargaining and mediation procedures outlined in the [Railway Labor] Act, have a federally guaranteed right to strike" (App. 39a); and (2) that under *California* v. *Taylor*, 353 U.S. 553, the right to strike was not impaired by the fact that the employer was a state agency (App. 38a).

The Court of Appeals reversed. It held that reversal was dictated by "the rationale of *National League of Cities* v. *Usery*, 426 U.S. 833" (App. 3a). It concluded that in so far as the application of the RLA to the LIRR "directly displaces the State's ability to structure employee-employer relationships and to make essential governmental decisions", it is not within the authority granted Congress by Article 1, Section 8, Clause 3 of the Constitution (App. 14a). In reaching this conclusion, the Court announced that the scope of essential government services for purposes of *National League* "is gauged not only in terms of the nature of a public service, but also its availability in the market place" (App. 22a). The

Court recognized that "the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (App. 9a), but applying a balancing test, it struck the balance in favor of the State interest (App. 25a).

Facts

The Long Island Railroad has for more than 150 years served as an interstate freight and passenger railroad link on Long Island, New York.

The character of this railroad reflects the physical structure of the island whose industries and people it serves. Long Island is an elongated insular projection, paralleling the entire length of the State of Connecticut. It is bounded on the north by Long Island Sound, separating it from Connecticut's south shore. The Atlantic Ocean is on its east and south and the Narrows, New York Bay and the East River form its west and northwest boundaries. It is connected by a series of bridges across the East River with Manhattan and the Bronx in New York City. It is about 118 miles long and 23 miles wide at its widest point, covering a land mass of about 1700 square miles. It is divided into four counties: Nassau, Suffolk, Queens and Kings, the last two of which are metropolitan boroughs of New York City.

The Long Island Railroad radiates throughout this entire land mass with 325 miles of main line track and 101 miles of branch line track. The most remote point of its service is the town of Montauk, Long Island, the island's end point, more than 100 miles or about three hours distant from Manhattan.

Incorporated on April 24, 1834, LIRR is one of the oldest railroads in the United States. In 1966 New York

State acquired ownership of LIRR through the respondent Metropolitan Transportation Authority, by stock purchase from the Pennsylvania Railroad Company. According to the records of the U.S. Department of Transportation, the Federal Government has poured millions of dollars into the LIRR since its acquisition by the State to improve and modernize its service.[3]

LIRR has at all times prior to this case considered itself a carrier subject to all federal railroad laws applicable to railroads in interstate commerce, including the Railway Labor Act[4] (J.A. 365).[5] It was not until after this action was filed, that respondents on February 8, 1980, "changed their posture completely by converting the Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law." (Fdg. of District Court, App. 31a.)

The district court found and the Court of Appeals confirmed that LIRR "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York City gateway between Long Island and other parts of the United States" (J.A.

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[3] The figure compiled by the Department exceeds $450,000,000 for the period 1967 to 1980. See also Moody's Transportation Manual, p. 212 (J.A. 410).

[4] Interstate Commerce Act, 49 U.S.C. 10501; Railway Labor Act, 45 U.S.C. 151; Railroad Retirement Act, 45 U.S.C. 231, Railroad Unemployment Insurance Act, 45 U.S.C. 351; Railroad Safety Improvement Act, 45 U.S.C. 39; Railroad Boiler Inspection Act, 45 U.S.C. 22; Federal Employers Liability Act, 45 U.S.C. 51; Labor-Management Reporting and Disclosure Act, 29 U.S.C. 401; Rehabilitation Act of 1973, 29 U.S.C. 794; Norris La Guardia Act, 29 U.S.C. 101.

[5] Reference to "J.A." herein is to the Joint Appendix filed in the Court of Appeals.

364). During 1978, it generated more than $18 million from its freight operations serving "numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms", interchanging "freight with more than a dozen other railroads which are interstate carriers" (J.A. 362-364).

LIRR has historically provided rail transportation not only for freight but for passengers throughout the entire length and breadth of Long Island, a land mass larger than Rhode Island.[6] Its commuters number about "90,000 regular Long Island passenger making two trips each day" (J.A. 269), less than 4% of the population of Nassau and Suffolk Counties of Long Island, (U.S. Census, 1980), a fraction of this percentage if the population of Queens County (which though a borough of New York City is served by the LIRR) is included.

The collective bargaining negotiations central to this dispute adhered to the form prescribed by the Railway Labor Act, consistent with all prior negotiations on this and all other interstate railroads since the passage of the Federal Railroad Labor Act in 1926.

Petitioner UTU served the LIRR with a notice under Section 6 of the Railway Labor Act. This notice triggered the time consuming and RLA complex procedures discussed in *Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369 at 378 (1969) in which it was explained that:

> That Act provides a *detailed framework to facilitate the voluntary settlement of major disputes.* A party

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[6] Freight-commuter railroads are wholly distinguishable from mass transit systems within the urban transit industry. Their history and their customs and usages are inseparably identified with the railroad industry of which they have been and remain, an integral

> desiring to effect a change of rates of pay, rules or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President", who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10 [emphasis added].

This action for declaratory relief was filed December 7, 1979, after 23 months of negotiations. On the following day, petitioner, having exhausted the RLA mandatory procedures, began a strike which ended six days later when the President of the United States, upon finding that the strike threatened " substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation services" issued Executive Order 12182 under Section 10 of RLA, establishing a Presidential Emergency Board 192 "to investigate and report respecting" the dispute. The action effectively imposed a moratorium on self-help actions by either party for an additional 60 days, expiring

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part. These freight-commuter railroads have always been classified as part of the railroad industry subject to the unique federal railway laws. See pp. 20-21, *infra*.

February 14, 1980. During a litigation interval involving state and federal court injunctions, reflecting the conflict between state and federal labor relations systems, and while the matter was pending before the Court of Appeals, the parties signed an agreement on April 11, 1980 (App. 6a).

On September 22, 1980, the National Mediation Board (NMB) ordered petitioner, respondent and the Staten Island Rapid Transit Operating Authority (SIRTOA) and all of the rail labor organizations representing the classes and crafts of employees employed by LIRR and by SIRTOA to show cause why the NMB should not cease to exercise jurisdiction over LIRR and SIRTOA, in light of the decision of the Second Circuit in this case. On March 9, 1981, the NMB issued an interim order that unless the decision of the Second Circuit in this case is modified or reversed, it "is bound by the determination of that Court that the interests of the State of New York outweigh those of the Federal government, and that the RLA does not pre-empt application of the Taylor Law to the carriers and their employees under the Supremacy clause and Commerce clause of the U.S. Constitution" (App. 72a-73a.)[7]

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[7] The NMB limited its interim order to the withholding of its mediatory services. In its view, the decision of the Second Circuit vitiates only that part of RLA which, under the court's holding, "impairs the State's ability to structure employer-employee relationships" of LIRR, by "eliminat[ing] a key [no strike] provision in the State's legislative effort to provide its citizens with continuous public transportation" (App. 3a, 14a). NMB accordingly announced that it will continue to process LIRR representational cases under the RLA (App. 7a.). Similarly minor disputes will continue to be processed under the compulsory arbitration provisions of the Railway Labor Act.

Respondents MTA and LIRR, joined by the Staten Island Rapid Transit Operating Authority, an MTA subsidiary, have filed

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the decisions of this Court in *California* v. *Taylor,* 353 U.S. 553, *United States* v. *California,* 295 U.S. 175 and *Parden* v. *Terminal R. Co.,* 377 U.S. 184, — confirmed in *National League of Cities* v. *Usery,* 426 U.S. 833, 854, n.18.[8] It misconceives the doctrine of *National League* and extends that doctrine to an area expressly disclaimed by the Court's opinion in that case. And its rationale creates confusion and uncertainty as to the limits of Congress' authority under the Commerce Clause. The issue presented is of major importance, requiring the balancing of the State's interest in the operation of a State-owned railroad free of federal regulation against the federal interest in the protection of interstate

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an action for a declaratory judgment in the federal court for the Eastern District of New York, challenging NMB's position as to the limited scope of the Second Circuit's decision. *Metropolitan Transportation Authority et al.* v. *National Mediation Board,* E.D. N.Y., Civ. 81-0721, filed March 11, 1981.

[8] See also *Helvering* v. *Powers,* 304 U.S. 171, which held that the city-operated elevated railway in Boston (and therefore the salary of its trustees) was not immune from federal taxation as a state governmental activity: "We see no reason for putting the operation of a street railway in a different category from the sale of liquors [in *Ohio* v. *Helvering,* 292 U.S. 360]. In each case, the state with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the state." *Id.* at 227. *A fortiori,* the business of operating an interstate freight and long-distance commuter railroad is, to paraphrase *Helvering,* "within the reach of the federal [commerce] power and is distinct from the usual governmental functions that are immune from federal [regulation] in order to safeguard the necessary independence of the state". The "power to tax involves the power to destroy". *McCulloch* v. *Maryland,* 4 Wheat. 316, 431.

commerce from disruption resulting from industrial discord. The importance of the issue is magnified by implications extending beyond the statute here in question to the entire body of the federal legislation in its application to state railroads, and beyond the area of railroads to other areas of State penetration into historically private business activities. For these reasons, review by this Court is warranted.

1. *California* v. *Taylor* and the related cases, *supra*, upheld the application of federal railroad legislation (the Railway Labor Act, the Rail Safety Act, and the Federal Employers Liability Act) to the operations of state-owned common carriers engaged in interstate commerce. The decision below denies the application of these cases to the LIRR, a state-owned railroad engaged in both the transportation of interstate freight and the provision of long-distance commuter service[9], on the ground that LIRR is the principal provider of railroad transportation service for some 90,000 weekday commuters on Long Island. It makes this distinction despite the presence in this case of the very interstate commerce facts which this Court held to be dispositive in *Taylor* (353 U.S. at 566); *i.e.* that the railroad here "is a necessary physical link with other railroads in the move-

[9] Arguably, the decision below limits the RLA only to the extent that it conflicts with the no-strike provision of the New York Taylor Act. The NMB, in its order of March 9, 1981, has taken the position that the Second Circuit's decision is applicable only to that part of the RLA which, under *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369, 378-82, guarantees that railroad employees or employers may resort to self-help once the RLA procedures designed to induce agreement have been exhausted. (App. 71a-72a). As noted above, p. 9, this ruling has been challenged by respondents in an action filed in the federal district court.

ment of a heavy volume of interstate rail freight . . . between Long Island and other parts of the United States" as found by the trial court below (App. 35a) and as recognized by the Court of Appeals in its characterization of the LIRR as "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (App. 9a). LIRR's freight operations are, at the very least, as "important to the national flow of commerce" as were those of the terminal railroad facilities held subject to federal labor legislation in *Taylor.*

In deviating from *Taylor,* the court below relies principally on the decision of this Court in *National League of Cities, supra,* misconceiving its holding and rationale, and seeking to expand the doctrine of that case in a manner incompatible with its expressly stated exclusion of railroads. *National League* repeatedly declares that the Tenth Amendment restriction on the federal power to regulate State activities under the Commerce Clause is limited to those activities which the States have "traditionally" regarded as part of "integral governmental functions" essential to their "separate and independent existence" as States. (426 U.S. at 845, 851, 852, 854, 855). Further articulating the limits of the Tenth Amendment immunity, *National League* explicitly identifies the operation of a railroad as the example of an activity which is not traditionally an integral function of government and is therefore not within the state's immunity under the Tenth Amendment (833 U.S. at 854, n.18). Accordingly, *National League,* expressly confirming *Taylor* and the cited railroad cases, cautions that:

> the holding of the *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the Congressional

> command was directed was not in an area that the states have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . ." For the same reasons, despite Mr. Justice Brennan's claims to the contrary, the holding in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today. [*Ibid.*]

In reaching the opposite conclusion as to the LIRR, the Second Circuit establishes a new and broader basis for marking out the area of Tenth Amendment immunity. In lieu of the National League tests of "traditionality" and "integrality", the Second Circuit prescribes a new "essentiality" test, with "essentiality [to be] gauged not only in terms of the nature of the public service, but also its availability in the market place." (App. 23a) — as distinguished from the concept of "functions essential to separate and independent existence" of States *qua* States. 426 U.S. at 845, 851.

The question whether the services of state-owned railroads are "essential to the public" and are "of necessity provide[d] almost exclusively by state and local governments" (upon which the decision below turns App. 17a) were not deemed relevant by this Court in the railroad cases confirmed by *National League*. Federal regulations in those cases were upheld because the operation of a railroad engaged in interstate commerce was not a traditional function essential to the sovereign existence of the States as States.

Thus, in relying on LIRR's service to some 90,000 Long Island weekday commuters to justify its departure from the *National League* caveat, the Second Circuit substantially broadens the *National League* concept

beyond the limits expressly stated by this Court. The affirmation of that express limitation by the Chief Justice in *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 390, 424 ("it should be evident, I would think, that the running of a [railroad] enterprise is not an integral operation in the area of traditional governmental functions"), citing the *National League* caveat *(supra,* at 854), was cavalierly dismissed by the Second Circuit as "limited to its antitrust context" (App. 20a).

The "certain possible implications of this Court's opinion" in *National League,* which Mr. Justice Blackmun did not "read so despairingly as does my Brother Brennan" (426 U.S. at 856), have now surfaced in the application of the *National League* concept to this case by the Second Circuit. These implications, which "troubled " Justice Blackmun (*ibid.*), have also surfaced in *Amersbach* v. *City of Cleveland,* 598 F.2d 1033 (C.A. 6) and in *Alewine* v. *City Council of Augusta, Civ.* 179-113 (S.D. Ga., Jan. 13, 1981), as yet unreported, applying the *National League* concept to a municipally owned airport and to a municipally owned and operated city bus system, respectively. Cf. *Joiner* v. *City of Macon,* Civ. 79-287-MAC (M.D. Ga. Apr. 24, 1981) as yet unreported, where the court held that the operation of a municipally owned bus company serving 10% of the city's citizens was not "a traditional function essential to the sovereign existence of the state".

In broadening the scope of *National League* immunity to include a state operated interstate freight/commuter railroad, the court below deviates from a line of decisions which have properly given a narrow construction to *National League.*[10] The broadened criteria suggest

[10] *Public Service Company of North Carolina, Inc.* v. *Federal Energy Regulatory Commission,* 587 F.2d 716 (C.A. 5), *cert.*

earlier labels for determining State immunity, such as "sovereign or "proprietary" or "essential", which have long been discounted as "rhetorical absolutes". See *New York* v. *United States,* 326 U.S. 572, 576. The immediate and potential impact of the new criteria on the application of federal laws to expanding state services, particularly in transportation, provide compelling reasons why the *National League* concept should be clarified by this Court at this time.

2. Having concluded that the commuter services provided by LIRR are within its amplified definition of the terms "traditional" and "integral governmental functions", as used in *National League,* the Second Circuit proceeds to find that the RLA "operates to displace 'essential government decisions'" because it precludes the state from applying the Taylor Law to enjoin the exercise of the federally guaranteed right of railroad employees to withdraw from service upon full compliance with the provisions of federal railway labor law.[11] (App. 15a).

But the RLA does not displace the State's power to make "essential government decisions". Cf. *Pearce* v. *Wichita County,* 590 F.2d 128 (C.A. 5), holding that

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denied, 444 U.S. 879 (1980); *Pearce* v. *Wichita County,* 590 F.2d 128 (C.A. 5); *Peel* v. *Florida Department of Transportation,* 600 F.2d 1070 (C.A. 5); *Joiner* v. *City of Macon, supra.*

[11] Respondent MTA waited until February 8, 1980, to reorganize LIRR to bring it within the literal terms of the Taylor Law (App. 31a, 36a). Throughout the preceding seven decades of this century, LIRR was admittedly subject to the Railway Labor Act, the Norris La Guardia Act, and other earlier federal laws bearing on railway labor relations, such as the Transportation Act of 1920, the Adamson Act, the Newlands Act of 1913, the Erdman Act of 1898. At no time, prior to that date, was the LIRR subject to the terms of the Taylor Law.

Congress may constitutionally impose the provisions of the Equal Pay Act, 29 U.S.C. 206(d) on state employers. Under provisions of the EPA, the state would be required to raise the pay of women employees to that of men doing equal work (section 206(d)(1)); but the Fifth Circuit deemed "[t]he ability to pay female employees less than those paid to male employees is not among the 'functions essential to [the] separate and independent existence' of the States" (590 F.2d at 132). Cf. also *Peel* v. *Florida Department of Transportation,* 600 F.2d 1070 (C.A. 5) applying the Veteran's Reemployment Act, 32 U.S.C. 2021-6, to State employers, in which the Fifth Circuit rejected the argument "that the reemployment provisions of the Act 'directly displace the State's freedom to structure integral operations in areas of traditional functions' " (at 1083).

Like the Equal Pay Act and the Veterans Reemployment Act, the Railway Labor Act does not impose federal standards on the decisions the State must make in regard to the wages, hours or conditions of employment of its employees. It requires only that the State, in the determination of those terms, bargain collectively in good faith with the chosen representatives of employees engaged in the operation of interstate railroads.

Nothing in the Railway Labor Act "compel[s] agreement between the employer and the employees". *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 549. It merely requires the parties to confer and negotiate, in recognition of the fact that "in the case of the carriers, experience has shown that . . . 'when there was a willingness . . . to meet [the employees'] representatives for a discussion of their grievances . . . strikes had been avoided'". *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45; *Virginian Ry. Co.,* 300 U.S.

at 549. Federal laws prescribing the channeling of collective bargaining therefore cannot be classified as operating "to force directly upon the States [Congress's] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." See *National League,* 426 U.S. at 855.

National League was concerned with the 1974 Amendments to the Fair Labor Standards Act (FLSA) extending the minimum wage and overtime provisions of the FLSA to state activities. The Amendments were "directed, not to private citizens, but to States as States." *National League* at 845. By that extension, Congress was deemed by this Court to "displace state policies regarding the manner in which [the States] will structure delivery of those governmental services which their citizens require" (*id.* at 847).

Unlike the 1974 FLSA Amendments at issue in *National League,* the Railway Labor Act of 1926 and its Amendments of 1934 were directed, not to the States but to the operation of interstate railroads. When New York took over the LIRR in 1965, it chose to enter a field whose labor relations were long governed by federal law.

Since the incorporation of the LIRR in 1834, the making of "choices and decisions in connection with [its] role as provider of certain public services" had been the role of private corporate managers operating with the same independence and responsibility as that exercised by railroad management throughout the United States (App. 13a). As stated by the MTA at the time of its acquisition of this property in 1965, no change took place in this respect (New York Times, Jan. 21, 1966 at p. 16). The new managers exercised the same degree of control in decision making as had their predecessors.

The Railway Labor Act did not, and does not, intrude into this process any more today than it did at any time in its history. Management maintains its freedom of choice in collective bargaining.

The *National League* concept of displacement of State policies can therefore not be squared with the legislative impact of time tested railroad legislation on interstate railroads subsequent to their purchase by the State. The State takes the railroad as it finds it.

3. The Second Circuit, "after weighing the usurpation of state policy-making and the invasion of integral state functions against the reason for the exercise of the federal commerce power" (App. 23a), concluded that "the State has a far greater interest in dispute resolution relating to the LIRR than does the federal government" (R. 24a). This conclusion rests upon the premise that "the freedom to strike [prohibited by Taylor Law] . . . could result in requiring the state to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause" (App. 14a-15a). This conclusion that the Taylor Law prohibition of strikes is necessary "to avert devastating economic injury" is precluded by the indisputable facts. The records of the New York Public Employment Relations Board show that during the period September 1967 to December 31, 1980, there were 279 strikes by public employees subject to the Taylor Law, with an estimated 4,105,000 work days idle (App. 77a), and in the case of public transit employees subject to that law, nine strikes, causing 370,500 idle work days. (*Id.*)

In contrast, there was a single work stoppage by employees of LIRR (November, 1972) between the fiscal years 1965 (when LIRR was purchased by the state) and 1980 prior to filing of this action, causing 175,000 work

days idle. The dispute which gave rise to this case resulted in a six-day strike in December, 1979, by employees represented by petitioner[12] and a two day strike in April, 1980, by other LIRR employees (App. 81a), together causing 24,000 man days lost.

The court's misconception of the practical experience under the RLA and under the Taylor Law, in its balancing of federal and state interests, is the consequence of the court's assumption of a hypothesis not asserted by respondents at any stage of this proceeding, and therefore not subjected to proof, briefing, or argument. See *infra,* pp. 19-21.

It is common knowledge that the automobile has been the principal reason for the substantial reduction in passenger train operations throughout the United States. The conditions on Long Island in this respect are not different from those in other sections of the United States. These stoppages do not and cannot have the "devastating economic injury" which the court below assumed in weighing the competing federal and state interests. The automobile takes over.

A railroad facility like the Long Island Railroad, no less than the Belt Railroad in *Taylor,* "is a vital link in the national transportation system." See *Taylor,* 566. "Its continuous operation is important to the national flow of commerce" (*id.*), as recognized in this case by the establishment of Presidential Emergency Board 192. This concern provides the foundation of the federal policy underlying the RLA and other federal laws affecting rail transportation. That policy has been well served

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[12] This work stoppage was terminated on its sixth day upon the establishment of Presidential Emergency Board 192 under Section 10 of the RLA.

by the RLA over a great period of time, on Long Island and throughout the country. Whether the States, by extending their activities to transportation facilities like the Long Island Railroad, can withdraw such operations from the traditional coverage of the Commerce Power raises serious questions of constitutional law requiring clarification by this Court. See *New York* v. *United States*, 326 U.S. at 582; *Helvering* v. *Powers*, 293 U.S. 214, 225.

4. The Second Circuit seeks to revise the *National League* concept of "integral operations in areas of traditional governmental functions" which, it enlarges to "very important public service which has come to be supplied primarily by state and local governments" (App. 17a). The broad implications of this expansion are clearly visible in its application to the facts of this case. The LIRR has been subject to federal laws governing the operations of interstate railroads as long as any other railroad in the United States (See *supra*, pp. 4, 16). Respondent MTA, by its purchase of the stock of LIRR in 1966 and by thereafter "engaging in interstate commerce by rail subject[ed] itself to the commerce power" and to the continuous application of all of the federal laws governing railroads. *Taylor*, 353 U.S. at 568; *U.S.* v. *California*, 297 U.S. at 184; *Helvering* v. *Powers*, 293 U.S. at 225. By "venturing into the Congressional realm" it assumed the conditions that Congress, under the Commerce Clause, attached. *Parden* 377 U.S. at 196.

5. The assumption of the court below that "the LIRR . . . as a provider of passenger transportation, furnishes a very important public service which has come to be supplied primarily by state and local governments" (App. 17a) has no support in the record or elsewhere. It is not based on evidence, was not briefed, and was not

mentioned in oral argument. Cf. *Taylor*, 353 U.S. at 557, n.2. The indisputable fact is that commuter railroad services outside the New York metropolitan area are predominantly supplied by twelve privately owned or operated interstate railroads, carrying commuters in nine major metropolitan areas.[11] In the five-state northeastern sector, the passenger trains of Consolidated Rail Corporation carry 231,000 commuters to work each day (New York Times, April 19, 1981, Business Section, p. 1). The only state-owned and operated railroads in the United States are to be sound in the New York metropolitan area.

Since the state and local governments are not the primary providers of commuter railroad services, the court's key premise for its conclusion that the operators of the LIRR are within the area of Tenth Amendment protection must fail.

Perhaps, the Second Circuit mistakenly considered interstate freight/commuter railroads, such as those described above, as part of the urban mass transportation industry consisting of buses, subways, cable cars, ferries and other mass transit modes engaged in local and suburban mass transportation over regular routes and on regular schedules. In comparing LIRR with subways and other modes of urban mass transit (see App. 17a, n. 20), the court failed to recognize the distinction between railroads carrying both interstate freight and

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[11] *Transit Fact Book*, American Public Transit Association, 1978-1979 ed., at pp. 74-75; J.A. 403-404. The twelve carriers are the Baltimore & Ohio, the Burlington Northern, the Chicago & North Western, the Milwaukee, the Chicago Rock Island, the Chicago South Shore, the Illinois Central, the Boston & Maine, Grand Trunk Western, Norfolk & Western, Pittsburgh & Lake Erie, and the Southern Pacific.

long distance commuters and urban systems carrying local and suburban passengers.[14] The history and practices of the former have always been identified with the railroad industry. "The railroad world for which the [Railway Labor] Act was designed has been described as a state within a state" for which Congress has provided "'techniques peculiar to [itself]' ". *California* v. *Taylor* 353 U.S. at 565-566. Commuter railroads have accordingly never been included within the standard urban transit industry classification of "companies and systems primarily engaged in local and suburban mass passenger transportation over regular routes and on regular schedules." U.S. Bureau of the Budget, *Standard Industrial Classification Manual* (Washington, G.P.O., 1967), pp. 203-205. If the court below indeed included the interstate freight/commuter railroads in the urban mass transportation industry, then the questions raised herein are of even greater importance and significance.

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[14] Commuter railroads traditionally provide railroad passenger service to the far distant suburbs and exurbs in the outer reaches of the central cities (*op. cit.* at 74); *e.g.*, the service provided by LIRR to Montauk in Suffolk County, some 128 miles and three hours distant from New York; the service provided by the Chicago North Western between Highland Park, Illinois and downtown Chicago. Municipal ownership of city bus and subway systems is the direct and immediate result of federal legislation enacted in 1964 to provide federal assistance "to State and Local Governments in financing . . . [mass transit] systems, to be operated by public or private transportation companies . . ." 49 U.S.C. 1601(b)(3). Prior to enactment of the Urban Mass Transportation Act, 95% of the nation's transit companies were privately owned. Urban Mass Transportation Administration, U.S. Department of Transportation, *A Directory of Public Transportation Service*, July 1979, p. 17.

CONCLUSION

The decision below is in direct conflict with decisions of this Court and distorts the holding and the rationale of *National League*. It raises fundamental questions concerning the balance of federal and state power as affected by the implications of *National League*. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1120—September Term, 1979

(Argued April 18, 1980 Decided September 15, 1980)

Docket No. 80-7199

UNITED TRANSPORTATION UNION,

Appellee,

v.

LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK,

Appellants.

Before:

MULLIGAN, *Circuit Judge*, and
SPEARS* and SWEET,** *District Judges.*

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* United States District Judge for the Western District of Texas, sitting by designation.

** United States District Judge for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Eastern District of New York, Hon. Jacob Mishler, Judge, granting a declaratory judgment that appellee's members have the right to engage in self help under the Railway Labor Act and permanently enjoining appellants from further prosecuting any state court action based on the Taylor Law.

Reversed.

EDWARD D. FRIEDMAN, Washington, D.C. (Harold A. Ross, Sidney Fox, Highsaw, Mahoney & Friedman, P.C., Washington, D.C.; Shapiro, Shiff, Beilly, Rosenberg & Fox, New York City; Ross & Kraushaar, Cleveland; Sanchez & McKay, Congers, N.Y., of counsel), for Appellee.

EUGENE P. SOUTHER, New York City (Anthony R. Mansfield, Todd M. Brinberg, Michael W. Kelly, Sheri A. Van Greenby, Seward & Kissel, New York City; Thomas M. Taranto, Jamaica, N.Y., of counsel), for Appellants.

RONALD M. ETTER, Acting General Counsel, National Mediation Board, Washington, D.C., brief for the United States as *Amicus Curiae*.

SWEET, D.J.

This appeal presents the question of whether employes of the Long Island Rail Road Company (the "LIRR") are subject to the provision in New York's Taylor Law, N.Y. Civ. Serv. Law §§ 200-214 (the "Taylor Law"), prohibiting strikes by public employees,[1] or the provision in the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (the "RLA"), allowing for such self help.[2] Resolution of this question presents the difficult and vexing task of determining the line which separates state and federal power in the penumbra where both state and federal legislation have been enacted. Since in this case we conclude that the RLA impairs the State's ability to structure employer-employee relationships in its role as sole provider of an essential public service, the rationale of *National League of Cities v. Usery*, 426 U.S. 833 (1976) requires that we reverse the decision of the district court.

I

The LIRR is a rail common carrier serving five counties within the metropolitan New York City area. It was acquired by New York State in 1966 through the agency now known as the Metropolitan Transportation

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1 N.Y. Civ. Serv. Law § 210 (1) provides:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike.

2 Although not explicitly set forth in the RLA, the parties may resort to self-help once the RLA's procedures designed to induce agreement have been exhausted. *See Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969).

Authority (the "MTA"), which continues to have day-to-day responsibility for the operation of the LIRR.

The LIRR carries approximately 250,000 passengers each week day and is the only common carrier by rail serving the public and industries in Nassau and Suffolk Counties. While its physical operations are solely within New York State, it interchanges freight with more than a dozen interstate rail carriers and handles from 800-1000 freight cars per week. Its revenue from freight operations in 1979 was in excess of $12.1 million. These freight revenues have decreased steadily over the years and now provide a fraction of its total income, which is estimated at more than $300 million.

The appellee United Transportation Union (the "UTU") is one of seven collective bargaining representatives for the LIRR operating and train employees. On December 7, 1979, as the parties were on the verge of exhausting the collective bargaining procedures provided by the Railway Labor Act, the UTU filed this suit in the Eastern District of New York seeking (1) a declaratory judgment that the relationship between the parties was governed by the RLA and that the employees could thus not be subjected to the sanctions of the Taylor Law in the event they engaged in self help; and (2) injunctive relief to protect those rights of the employees guaranteed by the Act, including an injunction against the commencement or prosecution of a state court action seeking to invoke the Taylor Law.

The next day, the unions, including the UTU, went on strike. On December 14, 1979, a Presidential Emergency Board was established pursuant to § 10 of the RLA, 45 U.S.C. § 160, and the employees returned to work.[3]

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[3] The "cooling off" period triggered by the President's action was to expire 60 days later, on February 14, 1980.

Appellants moved to dismiss this action but before the motion was heard, on February 8, 1980, converted the LIRR from a private stock corporation to a public benefit corporation whose employees would be at least facially subject to the Taylor Law. On February 12, the UTU responded by moving for a temporary restraining order and preliminary injunctive relief restraining the defendants from commencing a state court action pursuant to the Taylor Law to enjoin a strike by UTU members.

Following additional litigation[4] the UTU moved for summary judgment. In his opinion granting the motion, then Chief Judge Jacob Mishler found that the LIRR is a "carrier" engaged in interstate transportation and therefore subject to the Railway Labor Act. After further analysis, he concluded that the federal scheme preempts the State from regulating the labor relations of the railroad's employees, rejecting the invitation to find that such regulation improperly displaces the State's freedom to structure integral operations in areas of traditional governmental functions.

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4 On February 13, the LIRR commenced a suit against the UTU and other unions in Supreme Court, New York County, seeking an injunction under the Taylor Law against the impending strike. It was represented in that action by the State Attorney General. A temporary restraining order issued in that case, and on February 14, the unions removed that action to the United States District Court for the Southern District of New York. The unions then moved to transfer and consolidate the action with the instant action pending before Judge Mishler, and the LIRR moved to remand the state action. The latter motion was granted by Chief Judge Lloyd MacMahon on February 25.

A second procedural sideshow was instituted on February 27, when the UTU moved in Supreme Court, Queens County, to transfer the state action from New York County to Queens. That motion was denied on March 3, 1980, thwarting an apparent attempt to remove the action to the Eastern District of New York.

5 *United Transp. Union v. Long Island R.R., et al.*, No. 79-3118, slip op. at n.4 (E.D.N.Y. Mar. 5, 1980).

The district judge then issued a permanent injunction restraining the LIRR and the MTA from taking any action in state court based on an alleged violation of the Taylor Law. The UTU was also enjoined from engaging in any "self help" pending this Court's review of the case.[6]

II

Appellants argue, at the outset, that the State Attorney General is an indispensable party to this action because he is independently obligated to take the action that the UTU has sought to enjoin. Specifically, they refer to N.Y. Civ. Serv. Law § 211, which provides that the chief legal officer of the government involved shall apply to the supreme court for an injunction against a threatened violation of the Taylor Law.[7]

In this case the joinder of the Attorney General as a party is not necessary for the granting of complete relief, nor would the disposition of the action in his absence leave any of the parties subject to a substantial risk of incurring inconsistent obligations. Fed. R. Civ.

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[6] The labor dispute that precipitated this action was ultimately settled on April 11, 1980.

[7] N.Y. Civ. Serv. Law § 211 provides in pertinent part:

> Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation.

P. 19(a).[8] To begin with, there is no authority for the proposition that the Attorney General must proceed as a plaintiff in his own name in addition to bringing the action of the aggrieved state parties. Instead, the Attorney General or other "chief legal officer" must simply act as legal representative of such agencies in Taylor Act proceedings. *See Yorktown Central School Dist. No. 2 v. Yorktown Congress of Teachers*, 42 A.D.2d 422, 348 N.Y.S.2d 367, 371 (2d Dept. 1973).

Since in this case the Attorney General did not represent appellants, it could be argued that he should have been joined as a separate, indispensable party. However, the record indicates that the Attorney General was involved in a related action in state court, *see* note 4 *supra*, and that he undoubtedly had knowledge of the instant action and could have participated therein had he chosen to do so. Moreover, in light of the fact that the MTA and LIRR, in opposing the injunction, took the same position as the Attorney General would have taken, he cannot be heard to claim that the disposition of the action in his absence impairs his ability to protect the State's interests. Fed. R. Civ. P. 19(a)(2)(i).

Finally, disposition of this action without the presence of the Attorney General would not subject any party to a substantial risk of incurring inconsistent

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8 Fed. R. Civ. P. 19(a) requires joinder of a party if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

obligations. As the district judge noted, the Attorney General would be bound by any injunction in this action of which he had actual notice under Fed. R. Civ. P. 65(d).[9] Consequently, this action need not be dismissed for failure to join as an indispensable party.

III

We agree with the finding of the district court that the Long Island Rail Road is a "carrier" subject to the Railway Labor Act. A "carrier" includes a "carrier by railroad, subject to the Interstate Commerce Act" (the "ICA"). 45 U.S.C. § 151.[10] Such carriers must be involved in transportation outside a single state, 49 U.S.C. § 10501(2),[11] and do not include a street,

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9 Fed. R. Civ. P. 65(d) provides in pertinent part that an order granting an injunction:

> is binding only upon the parties, to the action, their officers, agents . . . and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order . . . .

10 Section 151 of Title 45 provides in pertinent part:

> When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—
>
> First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act . . . . *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. . . .

11 Section 10501 of Title 49 provides:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

interurban or suburban electric railway, unless such railway is operating as part of a general steam-railroad system of transportation. 45 U.S.C. § 151.

Appellants do not seriously dispute that the LIRR is subject to the literal terms of the Railway Labor Act. As the district court noted, the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York. Moreover, the LIRR historically has considered itself a "carrier" within the meaning of the RLA, as demonstrated by the facts that it has consistently filed reports required by the ICA and that is employees have received the benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act and the Federal Employees Liability Act.[12]

Appellants argue instead that Congress did not intend that the RLA apply to an essentially local

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(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad. . . .

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State. . . .

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle.

12 In addition, in a recent decision dealing with another subsidiary of the MTA, the Interstate Commerce Commission noted that the LIRR is a carrier subject to the Railway Labor Act. *Bhd. of Locomotive Engineers v. Staten Island Rapid Transit Operating Auth.*, Finance Docket No. 29011 (Nov. 8, 1979). Since the LIRR was not a party to that dispute the opinion of the ICC is not conclusive, but it does have some persuasive value.

commuter transportation system such as the LIRR simply because it does a limited amount of freight business. They note in this regard that Congress specifically excluded from RLA coverage certain types of local transportation systems that existed at the time of its enactment such as "suburban electric railways" and "street electric railways." 45 U.S.C. § 151.

While it is argued that Congress also would have created an exclusion for the LIRR if it could have foreseen how the railroad would evolve, we decline to legislate such an exception. Apart from a general reluctance to undertake such a task, we note that it is not clear what Congress would have done in this instance. The LIRR's freight business, while declining and less significant than its passenger business, still generates over $12 million in revenues derived from business in interstate commerce. Although this constitutes but a fraction of the revenues of the LIRR, its impact on interstate commerce is of some significance and consequently, any change in the regulation of this type of rail carrier must be left to Congress.

IV

If the LIRR were a privately owned carrier, the commerce clause regulation would prevail, and no further analysis would be required. The LIRR is a wholly owned subsidiary of a state agency, however, and appellants urge that even if the LIRR is subject to the literal terms of the RLA, that Act may not be enforced so as to allow a strike because it interferes with an integral state function, namely, the State's ability to structure employer-employee relationships in public commuter transportation.

Appellants have relied on *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Supreme Court struck down the application of the Fair Labor Standards Act's minimum wage and maximum hour provisions to state employees. In *National League of Cities*, the Supreme Court broke with precedent in finding that Congress may not exercise its power over interstate commerce "to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S.C. at 855. Although it did not fully define the meaning of "integral" or "traditional" state governmental functions, the plurality opinion indicated that they would include typically, fire prevention, police protection, sanitation, public health and parks. *Id.* at 851.

In a short but "pivotal" concurring opinion,[13] Mr. Justice Blackmun stated that he joined the plurality with the understanding that the Court had adopted a balancing approach under which federal regulation will be upheld if the federal interest is "demonstrably greater" than the State's. 426 U.S. at 856. While some commentators argue that the plurality actually rejected any weighing of federal and state concerns,[14] many lower courts have found a balancing approach to be implicit in that opinion. *See, e.g., Virginia Surface*

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13 *State Dep't of Transp. v. United States*, 430 F. Supp. 823, 825 (N.D. Ga. 1976).

14 See Matsumoto, National League of Cities—*From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 Ariz. St. L.J. 35, 71 n.193; Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 U.C.L.A. L. Rev. 1301, 1338, 1340 (1978). *But see* Horowitz, *The Autonomy of the Univ. of California under the State Constitution*, 25 U.C.L.A. L. Rev. 23, 33 (1977) (balancing approach in plurality opinion).

Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 435 (W.D. Va. 1980); *Remmick v. Barnes County*, 435 F. Supp. 914, 915 (D.N.D. 1977); *State of Colo. v. Veterans' Adm.*, 430 F. Supp. 551, 559 (D. Colo. 1977), *aff'd on other grounds*, 602 F.2d 926 (10th Cir. 1979) *cert. denied*, 444 U.S. 1014 (1980); *Usery v. Edward J. Meyer Memorial Hosp.*, 428 F. Supp. 1368, 1370 (W.D.N.Y. 1977). *See also State of Tenn. v. Louisville & N.R. Co.*, 478 F. Supp. 199, 206 (M.D. Tenn. 1979).

Even if the plurality did not adopt such a balancing approach, Justice Blackmun's test remains of crucial importance, for without his concurrence the federal regulation in *National League of Cities* would have been upheld. Accordingly, in cases since *National League of Cities* several circuits, including this one, have examined the federal interest in regulating the area in addition to determining whether the activity qualifies as an integral governmental function. *See Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84, 99 n.21 (3rd Cir. 1979) (en banc), *cert. granted in part*, ____ U.S. ____, 100 S.Ct. 2984 (1980); *Peel v. Florida Dept. of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979); *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592 (7th Cir.) (per curiam), *cert. denied sub nom. Scott v. United States*, 439 U.S. 1046 (1978); *United States v. Best*, 573 F.2d 1095, 1102 (9th Cir. 1978); *Friends of the Earth v. Carey*, 552 F.2d 25, 37-38 (2d Cir.), *cert. denied* 434 U.S. 902 (1977).

The inquiry is therefore essentially two-tiered. To determine whether MTA's operation of the LIRR falls within the sphere of protected state activity, we must first consider whether the operation of the railroad qualifies as an integral or traditional government function. It it does, the federal interest in regulating

the collective bargaining relations of LIRR employees under the Railway Labor Act must be weighed against the State's interest in applying the Taylor Law.

A. *Integral Government Function*

In *National League of Cities v. Usery*, the plurality attached various labels to the activities it sought to protect, referring to "functions essential to separate and independent existence," 426 U.S. at 845, "integral governmental functions," *id.* at 851, and "traditional governmental functions." *Id.* at 852. The tenor of the opinion, however, is that the States must retain the power to make certain choices and decisions in connection with their role as provider of certain public services.[15] The making of these choices and structuring of operations will be termed "essential governmental decisions." 426 U.S. at 850. The types of public services that are singled out for protection will be called "integral governmental functions." *Id.* at 855.[16]

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15 In this regard, the term "sovereignty" as used in the opinion has been defined to mean "the state's role of providing for the interests of its citizens in receiving important social services." Michelman, *States' Rights and States' Roles: Permutations of Sovereignty in* National League of Cities v. Usery, 86 Yale L.J. 1165, 1172 (1977). *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1074, 1076-77 n.42 (1977).

16 The plurality used the term "integral" in at least five places in *National League of Cities*, 426 U.S. at 851, 852, 854 n.18, 855 (twice). At one point the plurality states that the "challenged amendments operate to directly displace the State's freedom to structure 'integral operations' in areas of traditional government functions." *Id.* at 852. At other places, the phrase "integral" appears to have roughly the same meaning as "traditional." Michelman, *supra*, at 1172. While the phrase "integral government services" rather than "integral governmental function" might better indicate the focus on the public service provided, for the sake of consistency we chose to use the Supreme Court's phrase.

There is no question but that, as in *National League of Cities*, the operation of the federal statute directly displaces the State's ability to structure its employee-employer relationships and to make essential governmental decisions. *See* 426 U.S. at 851. In enacting the Taylor Law, New York State made a determination that in order to protect the public it must assure the orderly and uninterrupted operations and functions of government by prohibiting strikes by public employees. N.Y. Civ. Serv. Law § 200.[17] Enactment of the Taylor Act was prompted in large part by the transit strike which crippled New York City in 1966.[18] By precluding the State from enforcing this legislation, including its no-strike provision, the Railway Labor Act eliminates a key provision in the State's legislative effort to provide its citizens with continuous public transportation. This was graphically illustrated by the LIRR's week long walk-out in December and its two-day strike at the time

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17 N.Y. Civ. Serv. Law § 200 provides:

> The legislature of the state of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by (a) granting to public employees the right of organization and representation, (b) requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations representing public employees which have been certified or recognized, (c) encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes, (d) creating a public employment relations board to assist in resolving disputes between public employees and public employers, and (e) continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition.

18 New York Times, January 16, 1966, at 1, col. 1.

of the recent strike by New York City bus and subway workers. Moreover, the freedom to strike affects the collective bargaining process and could result in requiring the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause.[19] Thus the inability to prohibit public employee strikes and its possible economic effect deprives the States of the right to make the "fundamental employment decisions" that are essential to their "separate and independent existence." *Id.* at 851.

Having found that the RLA operates to displace "essential governmental decisions," it is next necessary to determine whether those decisions affect the operations of "integral governmental functions." In this regard, it seems beyond question that the LIRR is an important public service. That the State's operation of the LIRR therefore qualifies as a protected state activity, however, is not as readily resolved.

In *United States v. California*, 297 U.S. 175 (1936), the Supreme Court found that provisions of the Federal Safety Act were applicable to the State Belt Railroad, notwithstanding the fact that the railroad was owned by the State of California. Forty years later, in *National League of Cities v. Usery, supra*, the Court again addressed the subject of a state-owned railroad, stating in dictum:

> The holding of *United States v. California* . . . is quite consistent with our holding today. There California's activity to which the congressional

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19 The 11-day transit strike in April cost New York City an estimated $1.1 billion, and businesses lost an estimated $100 million daily. Cirrillo, *New Yorkers Ride Again*, Associated Press, April 12, 1980.

> command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce . . . ." 297 U.S., at 182.

National League of Cities v. Usery, 426 U.S. at 854 n.18. Mr. Justice Brennan noted in his *National League of Cities* dissent that, although the plurality distinguished *United States v. California*, its logic would overrule the earlier decision. 426 U.S. at 871. Commentators also have questioned the rationality of excluding railroads from the protected core of governmental functions, particularly the closer these railroads come to resembling commuter lines. *See, e.g.*, Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 Yale L. J. 1165, 1172 n.28 (1977).

We find that *United States v. California* does not dictate the result here. The plurality's definition of state sovereignty in *National League of Cities* suggests that "the terms 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times." *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979). Obviously, the catalog of essential state-provided services is not and cannot be static. As Mr. Justice Douglas observed in *New York v. United States*, 326 U.S. 572, 591 (1946) (Douglas J., dissenting), "[w]hat might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."

In view of the foregoing, *United States v. California* is distinguishable from the case at bar. The State Belt

Railroad, although operated intrastate as a "public function and without profit," was solely a freight service, the proceeds from which were used for harbor improvements. 297 U.S. at 183. The LIRR, on the other hand, as a provider of passenger transportation in a metropolitan area, furnishes a very important public service which has come to be supplied primarily by state and local governments.[20]

Aside from the fact that local passenger transportation is now of necessity provided almost exclusively by state and local governments, the service is essential to the public and inures to its benefit much more directly than did that provided by the California Belt Railroad. Without the LIRR, commuters would find it difficult or impossible to get to their jobs, and the reduced influx of people into New York City would have a significant impact upon the economy of the city and the State.[21] The absence of passenger rail service to and from Long Island would have a severe environmental impact.[22]

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20 Consider, for example, the Chicago Transit Authority, Massachusetts Transit Authority, San Francisco's Bay Area Rapid Transit. In addition, Miami is constructing a system that will connect the city with the suburbs, New York Times, Mar. 9, 1978, at 18, col. 1, and Atlanta has opened portions of its new rapid transit system. New York Times, July 1, 1979, at 16, col. 1.

21 See note 18, *supra*.

22 For example William J. Ronan, then Chairman of the New York State Metropolitan Commuter Transit Authority, testified during the Senate hearings in 1970 that "if the Long Island Railroad went out of existence tomorrow, it would take a minimum number of 26 lanes of expressway from Long Island in one direction, and 26 coming out of the city, to handle the traffic currently handled by the Long Island Railroad." *Effect of Railroad Mergers on Commuter Transportation: Hearings before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 1138 (hereinafter "Hearings"). He added that ten blocks in the center of New York City would have to be set aside solely for parking. *Id.*

Moreover, we cannot be blind to the sweep of world wide events which by all indications is forcing substantial alteration of our former profligate transportation practices and undeniably will create reliance on public mass transit.

In sum, there are two grounds for finding the State's operation of a passenger rail service, as distinguished from a freight service, to be an "integral governmental function." First, it is a service that the state and local governments are particularly suited to provide because of the community-wide need—and it is a service they have come to provide by a process of economic elimination of private suppliers. *See Amersbach v. City of Cleveland*, 598 F.2d at 1037. Although this is a relatively new development, there now is no reasoned basis for finding that the operation of an intrastate passenger service which transports tens of thousands to and from their jobs every day is any less a governmental function than are sanitation or public parks and recreation. *See National League of Cities v. Usery*, 426 U.S. at 851.

Second, there is little doubt that the LIRR's passenger service is of much more importance to the public, in several respects, than was the state-operated freight line in *United States v. California, supra.*

There is some question, however, as to the current validity of focusing on the importance of a public service when defining what constitutes an "integral governmental function." Historically, the Supreme Court has recognized that the range of arguably essential public services that could be provided by local government is potentially limitless, and has thus shied away from "public function" analysis. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53

(1974) (rejecting "essential public service" test for determining what constitutes state action).[23] *See generally Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 397-98 (1951) (public importance of gas and transit service to community irrelevant in light of congressional intent to permit strikes under NLRA).

More recently, in *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the Court again declined the opportunity to engage in "public service" analysis. In holding that municipalities are not automatically exempt from federal antitrust laws, the plurality avoided an "integral function" test altogether. Instead of focusing on the type of service involved—a municipally owned electric utility—the plurality stated that the city's anticompetitive practices would be immune from antitrust regulation only if authorized or contemplated by a legislative mandate from the State. *Id.* at 415.

In a concurring opinion, Chief Justice Burger relied on the fact that the utility was a proprietary enterprise, noting that the operation of a business enterprise is not "an integral operation in the area of traditional

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[23] In *Jackson v. Metropolitan Edison Co.*, *supra*, the Court also rejected an "affected with the public interest" analysis, quoting from *Nebbia v. New York*, 291 U.S. 502, 536 (1934):

> It is clear that there is no closed class or category of businesses affected with a public interest. . . . The phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . .

government functions." 435 U.S. at 423-24. He stressed that *National League of Cities'* definition of sovereignty is whether the State's interest involved "functions essential to separate and independent existence," *id.* at 423, and indicated that the state-owned railroad in *United States v. California* did not meet that definition even though it was operated "without profit, and as a 'public function.'" *Id.* at 422 n.4.

The impact of *Lafayette* on *National League of Cities* must be considered.[24] We believe that *Lafayette* may be limited to its antitrust context; indeed, the plurality noted a "presumption against implied exclusions from coverage of the antitrust laws." 435 U.S. at 399.[25] Moreover, while *Lafayette* involved an enterprise which is undoubtedly as important a public service as the operation of a local passenger railroad line, both the plurality and Chief Justice Burger's concurring opinions noted that the City of Lafayette competed with private utilities for customers in the area. *See* 435 U.S. at 391 n.3, 403-08, 422 n.3. Indeed, Chief Justice Burger stated that he used "the term 'proprietary' only to focus attention on the fact that all of the parties are

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24 See *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 430 (Stewart, J., dissenting) ("The plurality does not advance any basis for its disregard of National League of Cities . . . ."); Comment, National League of Cities *and the* Parker *Doctrine: The Status of State Sovereignty under the Commerce Clause*, 8 Fordham Urb. L.J. 301 (1980).

25 The Sixth Circuit, in considering the applicability of the Fair Labor Standards Act to city employees assigned to duties at the municipally owned airport, paid little attention to *Lafayette*. *Amersbach v. Cleveland*, 598 F.2d at 1036-38. The Third Circuit, however, in *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 99 n.21 (1979), noted that the "*Lafayette* Court paid scant attention to *National League of Cities*, thus suggesting that even under the commerce clause federal statutes may be enforced against the states."

in a competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws." 435 U.S. at 422 n.3. The existence of competition demonstrates that the public was not completely dependent on the municipality for the service and that it was economically feasible for private entities to provide it.

In contrast, had the MTA not taken over the operations of the LIRR in 1966, there probably would be no LIRR today. The substantial state and local funds used to subsidize the railroad attest to the fact that no private businessman would dare undertake the venture.[26] In short, not only is that particular activity essential to the public, but it is also essential that the government step in to furnish it.[27] *See Amersbach v. City of Cleveland*, 598 F.2d at 1037-38 ("[e]xperience has demonstrated that airports must be maintained by municipal corporations or other units of government").

Finally, the consistency of the result in *Lafayette* with the one conclusion we reach herein is further buttressed by the historical/empirical concept of state sovereignty implied in *National League of Cities* and alluded to above. In the words of one commentator, "As the problems faced by urban governments evolve, so will the citizenry's expectations of what are appropriate governmental services. Just as hospitals went from

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26 The federal government has also poured large amounts of money into the improvement of the LIRR (app. at 8 and 410). This fact does not affect the state immunity determination, however, as demonstrated by the fact that schools, hospitals and law enforcement all receive federal aid, but are considered integral state governmental functions. *See* 426 U.S. at 878.

27 New York State's purchase of the LIRR was premised on its finding that private enterprise would be unable to continue to own and operate the facility. *Hearings*, *supra*, at 134.

being accountable under federal regulations to a status of immunity, electric utilities may someday, in certain regions, provide an integral governmental function." Comment, National League of Cities *and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 Fordham Urb.L.J. 301, 332 (1980). (footnotes omitted) Stated differently, we conclude that essentiality is gauged not only in terms of the nature of a public service, but also its availability in the marketplace.

B. *Federal vs. State Interests*

This fluid concept of sovereignty contains the potential for devastating impact, and accordingly, has engendered some criticism. *E.g.*, Michelman, *supra*, 86 Yale L.J. at 1193; Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 Fordham L. Rev. 1115, 1134 (1977-78). However, fears that *National League of Cities* will spur a new era of separatism are dispelled somewhat by adherence to Justice Blackmun's balancing approach, which suggests that a "demonstrably greater" federal interest should override a state's claim to immunity even in an area found to involve an integral government function. 426 U.S. at 856.

This court has stated that:

> [i]n determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we [are] required to balance the reason for the exercise against the extent of usurpation of state policy-making or invasion of integral state functions that would result, giving "appropriate recognition to the

> legitimate concerns of each government." (citation omitted)

Friends of the Earth v. Carey, 552 F.2d at 37. In this case, it is not possible to say that after weighing the usurpation of state policy-making and the invasion of integral state functions against the reason for the exercise of the federal commerce power, that the federal interest is "demonstrably greater."

First, the objectives of the RLA are consistent with those of the Taylor Law: to provide an orderly method of dispute resolution and to ensure continuous service.[28] Congress stated the purpose of the RLA under section 2 as follows:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this [Act]; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

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[28] *See* note 17, *supra*.

45 U.S.C. § 151a. Avoiding interruption of commerce was deemed a "primary purpose" of the RLA by the Court in *California v. Taylor*, 353 U.S. 553, 566 (1957). The Taylor Law's prohibition against strikes seeks to further that purpose, thereby helping the LIRR to maintain its status as a "vital link" in the flow of interstate commerce. Moreover, while the state law preempted in *California v. Taylor* was the "antithesis" of the federal scheme, since it placed an absolute prohibition on the railroad employees' right to bargain collectively, *id.* at 559-60, the state law involved here preserves the right of independent collective bargaining in several respects. *See SIRTOA v. International Bhd. of Electrical Workers*, 57 A.D.2d 614, 393 N.Y.S.2d 773, 775-76 (2d Dept.), *cert. denied*, 434 U.S. 934 (1977).

Second, from a purely practical viewpoint, the State has a far greater interest in dispute resolution relating to the LIRR than does the federal government. While the federal government has the prevailing interest in the operation of the LIRR's freight service, the State and its municipalities have a vital, predominant interest in the continuous operation of its commuter-passenger service. In this case, the revenue from the purely intrastate passenger service was over 80% of the total revenue, and the number of trains allocated to that service was significantly greater than the number of cars on the freight line.

In sum, we recognize that the LIRR would come under the literal terms of the RLA, see *California v. Taylor, supra*, and that the right to strike, free from state interference, has been held essential to that federal scheme, *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-82 (1969). In the

present context, however, the federal interest in preserving the right of LIRR employees is not "demonstrably greater" than New York State's interest in preventing LIRR strikes in order to ensure continuous passenger service for so many daily commuters. We reach this result with the realization that the determination of whether state or federal interests are paramount may be difficult to resolve in future cases. However, that difficulty cannot preclude a conclusion required by the present circumstances and authorities.

Again, we are, as we must be, guided by *National League of Cities'* ground-breaking holding that:

> States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. . . . Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. 426 U.S. at 854-55.

Since the rationale of *National League of Cities* requires reversal here, it is not necessary to determine whether the district court improperly enjoined the LIRR and MTA from prosecuting the state court action.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of December, one thousand nine hundred and eighty.

No. 80-7199

UNITED TRANSPORTATION UNION, *Plaintiff-Appellee,*

v.

LONG ISLAND RAIL ROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY
OF NEW YORK, *Defendants-Appellants.*

(Filed December 17, 1980)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, United Transportation Union,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 C 3118

UNITED TRANSPORTATION UNION, *Plaintiff,*

-against-

LONG ISLAND RAIL ROAD and METROPOLITAN TRANSPORTATION ASSOCIATION, *Defendants.*

Memorandum Of Decision

(March 5, 1980)

Appearances:

For the Plaintiff United Transportation Union, and *amicus curiae* Brotherhood of Locomotive Engineers, Railroad Yard Masters of America, Brotherhood of Railway Signalmen, Brotherhood of Railway Carmen, International Association of Machinists, and Brotherhood of Railroad and Airline Clerks:

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MISHLER, CH. J.

This action arises within the context of a labor controversy between those employees of the Long Island Rail Road (the "Railroad") whose exclusive bargaining representative is the United Transportation Union (the "UTU"), and the Railroad and its parent agency, the Metropolitan Transportation Authority (the "MTA"). On December 6, 1979, as the parties were on the verge of exhausting the collective bargaining procedures mandated by the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, (the "Act"), the UTU filed this suit seeking: (a) a declaratory judgment that the relationship between the parties was governed by the Act and that the employees could thus not be subjected to the sanctions of Sections 200 to 214 of the New York Civil Service Law (the "Taylor Law") in the event they engaged in the "self-help" authorized by the Act; and (b) injunctive relief to protect those rights of the employees guaranteed by the Act, including an injunction against the commencement or prosecution of a state court action seeking to invoke the Taylor Law. On December 8, 1979 the UTU employees went on strike. On December 14, 1979, President Carter established an Emergency Board pursuant to section 10 of the Act, 45 U.S.C. §160, and the employees returned to

work. The "cooling off" period triggered by the Presidential action was to expire on February 14, 1980.

On January 17, 1980 the defendants took their first action in this suit, filing a motion to dismiss in which they claimed that no justiciable case or controversy existed since they did not believe that the Taylor Law could be invoked against the UTU's members and thus had no intent of invoking its sanctions. According to the defendants, while the Railroad was a subsidiary corporation of the MTA, it was not a "public benefit subsidiary corporation," and thus, as a matter of state law, its employees were not "public employees" subject to the Taylor Law. *See* N. Y. Public Authorities Law §1265(9)(a); N. Y. Civil Service Law §201(7)(A).

On February 8th, however, before the motion to dismiss could be heard, the defendants changed their posture completely by converting the Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law. On February 12th, the UTU responded by moving for a temporary restraining order and injunctive relief preliminarily restraining the defendants from commencing a state court action grounded on the Taylor Law to enjoin a strike by the UTU's members. The undersigned denied the motion on the record. At that time, because the parties appeared to agree that all pertinent facts were a matter of record, the court suggested that they expeditiously attempt to arrive at an agreed statement of facts so that the case might be speedily decided. The suggestion, however, was not followed.

Instead, on February 13th — two days before the expiration of the "cooling-off" period — the Railroad, by order to show cause, commenced suit against the UTU and other unions in Supreme Court, New York County, seeking an injunction under the Taylor Law against the impending strike. *The Long Island Rail Road Co.* v. *United Transportation Union, et al.*, No. 40327/80 (Sup. Ct. N.Y. Co.). Justice Peggy Bernheim issued a temporary restraining order and set down a hearing on the Railroad's motion for a preliminary in-

junction for February 15th. On February 14th, the unions removed that action to the United States District Court for the Southern District of New York, and moved to have the action transferred to this court and consolidated with the instant action. *The Long Island Rail Road Co.* v. *United Transportation Union, et al.*, No. 80 Civ 0914 (S.D.N.Y.). The Railroad moved to remand the state action. With the consent of the parties, the temporary injunction against the strike was continued while Chief Judge MacMahon considered the motions.

On February 21st, the defendants filed their answer in the instant action. As is pertinent here, paragraph four of the answer admits the allegation in paragraph four of the complaint that the Railroad "interchanges freight with railroads engaged in interstate commerce."[1] However, it denies the remaining allegations of that paragraph, including the averments that the Railroad "is a Class I railroad engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce . . . and is a 'carrier' within the meaning of that term as defined in the Railway Labor Act." The answer further affirmatively alleges that the Railroad is a public benefit corporation engaged "essentially [in] intrastate commuter service" (¶ 18) and that its employees are governed by the Taylor Law rather than the Act.

On February 25th, Chief Judge MacMahon, in a written opinion, granted the Railroad's motion to remand the action before him to the state court. On February 27th, the unions moved before Justice Sidney Leviss in Supreme Court, Queens County, to transfer the state action from New York County to Queens. Justice Leviss continued the temporary restraining order against the union's threatened strike and directed that

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[1] Defendants sought to file an amended answer on March 4, 1980, the day that the parties appeared to argue plaintiff's motion for summary judgment. As is pertinent here, the proposed amended answer is substantially identical to the one orginally filed.

the Railroad refrain from seeking a preliminary injunction in New York County pending his decision on the venue motion.[2]

Finally, on February 28th, the plaintiff in the instant action sought and obtained from the undersigned an order to show cause bringing on the summary judgment motion which is the subject of this opinion. Argument was heard on March 4th.[3] At the conclusion of the argument the court granted the relief which we will outline below and advised the parties that this written opinion would be issued shortly. A copy of the judgment which was entered on March 4th pursuant to the court's oral opinion is appended hereto.

The Issues

There are three major issues confronting us:

(1) Is the Railroad a "carrier" subject to the Act;

(2) If so, does the Act preempt the application of the Taylor Law to the Railroad's employees;

(3) If the Taylor Law may not be applied to bar a strike by the plaintiff's members, what is the appropriate relief.

Discussion

A. As the defendants conceded both at the February 12th oral argument on plaintiff's motion for a preliminary injunction and at argument on the instant motion, the only major issue which requires a factual finding is the first of those we itemized, *i.e.*, whether the Railroad is a "carrier" within the meaning of the Act, 45 U.S.C. §1. More specifically, the defendants contend that a factual issue exists as to whether the Railroad is engaged in or has a sufficient impact on in-

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[2] Justice Leviss denied the motion on March 3, 1980.

[3] At that time, the defendants moved to dismiss the action on the ground that the plaintiff had failed to join as an indispensable party the New York State Attorney General. Fed.R.Civ.P. 19. They also moved to stay the instant action pending the outcome of the State proceedings. The court denied both motions from the bench.

terstate transportation to fall within the Act's regulatory scheme. The existence of this question of fact they assert, precludes the grant of summary judgment. We disagree.

The court's function on a motion for summary judgment is to determine whether any material factual issues are in dispute. *Adices* v. *S. H. Kress & Co.*, 398 U.S. 144, 159, 90 S. Ct. 1598, 1609 (1970). The burden is on the moving party to establish that the material facts are either conceded, undisputed, or beyond dispute. *See Heyman* v. *Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1319 (2d Cir. 1975). And, "the mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Quinn* v. *Syracuse Model Neighborhood Corp.*, No. 79-7561, slip op. at 835 (2d Cir. January 8, 1980) (emphasis in original). The plaintiff has made such a convincing demonstration here.

The plaintiff has submitted documentation clearly establishing that the Railroad is the only common carrier by rail serving the numerous industries and traveling public in the Counties of Nassau and Suffolk. It has submitted reports filed by the Railroad with the ICC indicating that the Railroad's revenues from its freight operations exceeded $18 million in the year ending December 31, 1978. These revenues were obtained as a result of providing freight service to numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms. Furthermore, while the Railroad's own physical operations are located solely within New York State, its freight service supplies a critical link in the transportation of goods both to and from points throughout the continental United States and Canada. This is clearly evidenced by the fact that the Railroad interchanges freight with more than a dozen other railroads which are interstate carriers. According to the plaintiff, the Railroad presently handles approximately 1,000 freight cars per week to consignors and consignees over its tracks.

The defendants, in response, do not seriously dispute most of these factual allegations. Indeed, they admit that the

Railroad does interchange freight with other carriers going in and out of New York State. They argue, however, that the Railroad's freight revenues and operations are miniscule when compared to the scale of its intrastate commuter operations, and that as such, it should not be considered an interstate carrier. We reject this contention.

According to the defendants' own affidavits, the Railroad's revenues from freight operations in 1979 were, at a minimum, in excess of $12.1 million. Affidavit of James B. Huff, Controller of Metropolitan Transportation Authority, ¶ 9. These affidavits also contain claims that in 1978 the Railroad operated over 4,400 freight train trips, involving approximately 41,000 freight cars, or 800 cars per week. While these figures are slightly lower than those submitted by the plaintiff, the differences are not material for our present purposes. Nor, in the face of these figures do we find material the fact that the Railroad's freight revenues have decreased steadily over the years and that they now provide a small fraction of the Railroad's total income. Indeed, these figures, rather than undermining the plaintiff's characterization of the Railroad as an entity affecting interstate commerce, provide substantial support for the conclusion that the Railroad "is a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States." *Long Island R.R. Co.* v. *Brotherhood of R.R. Trainmen,* 185 F. Supp. 356, 357 (E.D.N.Y. 1960). In short, were we to consider nothing more than the defendants' own papers we would be compelled to conclude that the Railroad is engaged in "interstate transportation," and thus subject to the Act. *State* v. *Taylor,* 353 U.S. 553, 561, 77 S. Ct. 1037, 1042 (1957). *See United States* v. *Union Stock Yard & Transportation Co.,* 226 U.S. 286, 304, 33 S. Ct. 83, 88 (1912) ("That the service is performed wholly in one state can make no difference if it is a part of interstate carriage.").

We note, however, that in addition, the Railroad has historically considered itself as a "carrier" within the meaning

of the Act, the Interstate Commerce Act, 49 U.S.C. §§1 *et seq.*, and related statutes. Thus, it has consistently filed reports required by the Interstate Commerce Act with the ICC. In addition, its employees have consistently received the benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employees Liability Act. Moreover, in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the Act, including the establishment of a Presidential Emergency Board. We do not believe that the Railroad can now unilaterally change its essential character within this context by the simple expedient of reorganizing its corporate structure under state law.

Finally, we think it relevant to point out that both the Emergency Board convened in this dispute, and the ICC in a recent decision dealing with another subsidiary of the MTA, *Brotherhood of Locomotive Engeneers* v. *Staten Island Rapid Transit Operating Auth.*, Finance Docket No. 29011 (Nov. 8, 1979), stated that the Railroad is a carrier subject to the Act.

Against this background we are convinced that no fact question exists as to the interstate character of the Railroad's operations. We find that the Railroad is a carrier within the meaning of the Act.

B. Having found that the Railroad is a carrier within the meaning of the Act we must next determine whether its employees are free to resort to the self-help permitted by the Act or are subject to the prohibition and penalties of the Taylor Law. Resolution of this issue turns upon whether the federal scheme established by the Act preempts the state from regulating the strike activities of the Railroad's employees. We believe that it does.

While the issue is of extreme importance, we do not think that it would serve any useful purpose to embark on a lengthy discussion of the relationship between the pertinent federal and state legislation. We have only recently dealt with the

identical issue in a remarkably analogous context. In *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Transit Operating Authority*, No. 78 C 2083 (E.D.N.Y. February 9, 1979), we were asked to decide whether the Taylor Law could be applied to employees of another MTA subsidiary, the Staten Island Rapid Transit Operating Authority ("SIRTOA"). We held that if SIRTOA was subject to the Act its employees were free to engage in strike activities notwithstanding the fact that SIRTOA was a public benefit corporation whose employees were therefore subject to the Taylor Law's proscription of such conduct.

In reaching this result we held first that as a general matter, under the Supreme Court's holding in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109 (1969), employees covered by the Act could not be prevented by the state from exercising their federally protected right to strike upon exhaustion of the Act's mandatory bargaining and mediation procedures notwithstanding the fact that a strike might result in substantial inconvenience or hardship to the public:

> [T]he exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission would be seriously affected by the knowledge that after the procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike.
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> * * *
>
> Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act. State courts may not enjoin a peaceful strike by covered railway employees, no

> matter how economically harmful the consequences may be.

Id. at 380-85, 89 S. Ct. at 1116-19.

We then held that under *State of California* v. *Taylor, supra,* 353 U.S. at 563-65, 77 S. Ct. at 1043-44, the right to strike was not impaired by the fact that the employer was a state agency:

> Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. [However,] [t]he fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. . . .When Congress wished to exclude state employees [from coverage under federal labor legislation] it expressly so provided. Its failure to do likewise in the Railway Labor Act indicates a purpose not to exclude state employees.

See also Parden v. *Terminal Railway,* 377 U.S. 184, 84 S. Ct. 1207 (1964); *International Longshoremen's Assoc.* v. *North Carolina State Ports Auth.*, 463 F.2d 1 (4th Cir.), *cert. denied,* 409 U.S. 982, 93 S. Ct. 318 (1972).[4]

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[4] SIRTOA also contended, as the defendants do here, that to subject it to the Act's regulatory scheme would be inconsistent with the Supreme Court's holding in *National League of Cities* v. *Usery,* 426 U.S. 833, 96 S. Ct. 2465 (1976), that the Tenth Amendment prohibits Congress from legislating in a manner which operates to directly displace the States' freedom to structure integral operations in areas of traditional governmental function. . . . " *Id.* at 852, 96 S. Ct. at 2474. We rejected this contention as

> inconsistent with the Court's own language in *Usery* which specifically held that the operation of a railroad in interstate commerce is not an integral part of governmental activity and further held that its earlier decisions in *United States* v. *California,* [297 U.S. 175, 56 S. Ct. 421 (1936)], and *California* v. *Taylor,* [353 U.S. 553 77 S. Ct. 1037 (1957)], were not undermined by *Usery. Id.* at 854-55 n. 18, 96 S. Ct. at 2475 n. 18. We believe that SIRTOA's operation, even if characterized as a commuter rail service is not akin to such state activities as "fire prevention, police protection, sanitation public health, and parks and recreation [which] are typical of those

Next, we held in *SIRTOA* that the tangential relationship between the carrier's activities and interstate commerce did not justify application of the Taylor Law. We noted that there was no legal basis for balancing the local interest against the federal interest in determining whether the Act of the state's legislation applied. "Not a single authority has been cited to this court which even suggests that we should engage in a quantitative analysis, debilitating the Act in some proportionate measure as the connection with interstate commerce decreases." Slip op. at 25.

Finally, we concluded that "New York State may not validly apply its Taylor Law to the employees of SIRTOA. Such abridgement of the right to strike, even when the affected employees are public servents, is a direct assault upon the heart of the federal scheme of labor relations in the railway industry. Under the Supremacy Clause of our Constitution, it is unquestionable that the federal scheme predominates." Slip op. at 26.

What this court said in *SIRTOA* applies with equal force in the present case. We find that employees of the Railroad, who have exhausted the mandatory bargaining and mediation procedures outlined in the Act, have a federally guaranteed right to strike.

C. From the foregoing, we think it clear that the plaintiff is entitled to a declaratory judgment that its members have the right to engage in self-help under the provisions of the Act and that the Taylor Law may not be invoked in derogation of this right. Moreover, we believe that the plaintiff is also entitled to a permanent injunction restraining the defendants from further prosecuting the state court action based on the Taylor

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performed by state and local governments in discharging their dual functions of administering public law and furnishing public services." *Id* at 851, 96 S. Ct. at 2474.

Slip op. at 24-25.

We see no reason why a different conclusion should be reached in the instant case.

Law. While we reach this latter conclusion with some hesitation we believe that the particular circumstances before us warrant the grant of such relief.

It is of course well-established that a federal court may enjoin a pending state court proceeding only where such an injunction is specifically permitted under one of the express exceptions to the Anti-Injunction Act, 28 U.S.C. §2283.[1] *See e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 2887 (1977). It is clear, however, from the very language of §2283 that a federal court has the authority to issue an injunction "to protect or effectuate its judgments."

Thus, the courts have held that an injunction may properly issue for the purpose of preventing relitigation in the state court of a matter which has been finally determined by a judgment in the federal forum. *See, e.g., Mitchum* v. *Foster*, 407 U.S. 225, 235-36, 92 S. Ct. 2151, 2158-59 (1972); *Samuel C. Ennis & Co., Inc.* v. *Woodmar*, 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S. Ct. 1112 (1977); *International Assoc. of Machinists* v. *Nix*, 512 F.2d 125, 130 (5th Cir. 1975); *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855, 94 S. Ct. 157 (1973); *Complaint of Cosmopolitan Shipping Co., S.A.*, 453 F.Supp. 268 (S.D.N.Y. 1978); *Walter E. Heller & Co., Inc.* v. *Cox*, 379 F.Supp. 299 (S.D.N.Y. 1974). The rationale for permitting injunctions in such instances was stated by the

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[1] We note that there is at least some question as to whether §2283 is at all applicable to the issue before us since the complaint in this action was filed prior to the commencement of the state court proceedings and prayed for an injunction against their institution. *See Dombrowski* v. *Pfister*, 380 U.S. 479, 484 n. 2, 85 S. Ct. 1116, 1119 n. 2 (1965). However, because state proceedings are presently pending, we assume that §2283 does apply. In any event, since we believe that an injunction is authorized under one of the express exceptions to the statute, our analysis of the propriety of issuing such an injunction is identical to that we would engage in if the statute did not come into play.

Fifth Circuit in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1312 (5th Cir. 1971), *cert. denied* 404 U.S. 1047, 92 S. Ct. 701 (1972): "This [exception to §2283] is a sensible solution to the problem of relitigation of federal decisions. It prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review."

Other cases have sustained the propriety of issuing an injunction against state court proceedings under the "protect or effectuate" exception to §2283 where the state court action, while not involving matters identical to those litigated in the federal court, nonetheless threaten to nullify the vitality of the federal judgment. *See e.g., United Industrial Workers of the Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves,* 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905, 89 S. Ct. 1747 (1969); *N.L.R.B.* v. *Schertzer,* 360 F.2d 152 (2d Cir. 1966); *Sperry Rand Corp.* v. *Bothlein,* 288 F.2d 245 (2d Cir. 1961). Thus, we think it clear that §2283 does not present an absolute bar to our issuing an injunction that is necessary to assure that our declaratory relief will be effective.

However, the fact that a federal court has the *power* to enjoin state proceedings in order to protect its own judgment does not mean that it is appropriate to exercise that authority in every instance. Whether such an injunction should issue hinges upon consideration of a number of factors including "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum* v. *Foster, supra,* 407 U.S. at 243, 92 S. Ct. 2162. While we have found no case which directly addresses the precise issue before us, there are several cases which point to the propriety of injunctive relief in circumstances such as these. Thus, in *Donelon* v. *New Orleans Terminal Co., supra,* the Fifth Circuit Court of Appeals affirmed the district court's grant of an injunction against local officials prosecuting a state court action in which they sought

injunctive relief against allegedly unsafe practices of a railroad. The appellate court held that the injunction was properly issued by the district court in order to protect its own earlier final judgment holding that the railroad could not be subjected by local authorities to safety standards outside of the Federal Railroad Safety Act.

Even more analogous to the present situation is *United Industrial Workers of the Sea farers Int'l. Union* v. *Board of Trustees of Galveston Wharves, supra.* In that case a railroad carrier decided during the terms of the collective bargaining agreement with the plaintiff union to lease its facilities. This action would have resulted in the termination of its operation and its need for employees. The Union responded by requesting negotiation; when the carrier refused, it commenced a strike and picketing. The Union also commenced an action in federal district court seeking to enjoin the consummation of the carrier's lease agreement pending exhaustion of the Railway Labor Act's processes. The district court denied the requested relief and relegated the "minor dispute" to the Railroad Adjustment Board. On appeal, the circuit court reversed and held, *inter alia,* that because the dispute was a "major" one the carrier was required to negotiate in good faith with the Union. After further proceedings in the district court, a second appeal and remand, *see United Industrial Workers of Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves*, 368 F.2d 412 (5th Cir. 1966), the district court ordered the Carrier to negotiate. It also enjoined the Carrier from "enforcing, giving continued effect to or availing [itself] in any manner whatsoever of the benefits of a state court injunction that [it had obtained] to enjoin the picketing by members of the Union." On appeal the Fifth Circuit Court of Appeals held that the injunction had been properly issued. The court found that the Union's picketing and strike were permitted under the federal act because the Carrier had refused to comply with its statutory duty to negotiate. Moreover, the court determined that "[t]he effect of the state court injunction against a possible Union strike [was] perhaps to

render impotent the duty to bargain imposed by [the] Court." 400 F.2d at 331. The court concluded that

> [t]he right to strike is adjunct to the Union's statutory rights and implicit in our [bargaining] order. This national labor policy cannot be frustrated by a state court injunction. *To effectuate* the *judgment of the federal court,* the district court properly enjoined the Carrier from availing itself of the state court injunction.

Id. at 334 (emphasis added).

Of course, these cases do not stand for the proposition that a federal district court may "enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even where the interference is unmistakably clear." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 294, 90 S. Ct. 1739, 1747 (1970). However, these decisions do indicate that where a federal court has finally declared that a party does enjoy a protected right and the pending state judicial proceeding threatens to nullify the effect of the federal court's determination, an injunction may issue to prevent such a result. Moreover, we find support for this conclusion in the Supreme Court's decision in *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers, supra.* There, in 1967, a railroad applied to a federal district court for an injunction which would restrain a union from picketing. The district court denied the requested relief. The railroad then sought and obtained the identical relief in a state court. Sometime thereafter the Supreme Court decided in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co., supra,* as we noted above, that railway employees covered by the Railway Labor Act had a federally guaranteed right to engage in self-help activity such as picketing. Apparently in response to this decision, the union returned to federal district court and obtained an injunction against the enforcement of the state court's restraining order.

The Supreme Court found that the district court's action was barred by §2283, rejecting *inter alia*, the union's contention that the injunction was necessary to "protect or effectuate" the district court's 1967 judgment which had denied the railroad's application for injunctive relief against the picketing. Significantly, however, the Court went to great lengths to find that the rationale of the 1967 decision was not the same as that subsequently announced in *Jacksonville Terminal*. Rather, it construed that earlier decision as having been based soley on the district court's belief that under the Norris-LaGuardia Act, 29 U.S.C. §101, it was without jurisdiction to grant the relief sought by the railroad. We think that a fair reading of both the majority and dissenting opinion in *Atlantic Coast Lines* leads to the conclusion that had the district court's earlier decision adjudicated the union's rights under the Railway Labor Act — as we have here — an injunction to protect that adjudication would have been found by the Court to have been appropriate.

Turning to the facts of the instant case, we think that they present compelling reasons why an injunction against the state court action is appropriate. First, by the defendants' own admission, the state court action presents the identical issues which we have fully adjudicated herein. Thus, because in this court's view our determination here would certainly preclude relitigation in the state forum under the doctrine of *res judicata*, we can see no purpose which the state court action would serve apart from casting doubt on the finality and force of this court's judgment. We also believe that this concern is particularly compelling where, as here, important federal rights implicating national labor policy are at stake. Moreover, in view of the fact that the Attorney General of New York has a statutory obligation to pursue the remedies set forth in the Taylor Law, *see* N.Y. Civil Service Law §211, an assault on these federal rights is a certainty absent an exercise of this court's injunctive powers.

Another consideration is the fact that the entire history of this litigation leads to the conclusion that the defendants

have sought to adjudicate this matter in the state court solely because they believe that a different result could be obtained in that forum. *See Staten Island Rapid Transit Operating Authority* v. *International Brotherhood of Electrical Workers*, 57 A.D. 2d 614 (2d Dep't.), *leave to appeal denied*, 42 N.Y.2d 804, *cert. denied*, 434 U.S. 934, 98 S. Ct. 421 (1977). While we are confident that the state court would give full effect to our determination, even the remote possibility of inconsistent judgments in an area of such great importance should be avoided if at all possible. Additionally, we think it important that the present action was commenced some two months prior to the action in state court. This is not a case where the federal plaintiffs have sought to preclude the orderly consideration and determination of an issue already pending before the state court. Rather, it has been the defendants who have sought to forum shop for a more sympathetic ear and who have endeavored to avoid determination of this federal issue in a federal court. Lastly, this court believes that the integrity of the collective bargaining scheme established by the Railway Labor Act requires a prompt and final determination that plaintiff's members have a guaranteed right to engage in self-help. The longer that this issue remains unresolved or that doubts continue to linger, the longer that the federal scheme for resolving railway labor disputes remains nugatory. It is for these reasons and out of no disrespect for the state court's integrity or ability that we take the drastic step of enjoining further state court action affecting the rights of this plaintiff.

Finally, however, because we believe that the issues involved are difficult ones whose resolution are clearly not free from doubt, we think that it would be appropriate to enjoin the plaintiff from engaging in any "self-help" pending the Second Circuit's review of our decision. Such an injunction is clearly necessary to preserve the status quo pending appeal. *See Chicago and North Western Railway Co.* v. *United Transportation Union*, 471 F.2d 366, 368 (7th Cir. 1972), *cert. denied*, 410 U.S. 917, 93 S. Ct. 965 (1973). Of course, if the

defendants do not prosecute their appeal expeditiously, we would consider vacating this injunction.

/s/ JACOB MISHLER
Jacob Mishler
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 C 3118

UNITED TRANSPORTATION UNION,
(EDWARD YULE, JR., Its General Chairman), *Plaintiff,*

-against-

LONG ISLAND RAIL ROAD COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY OF NEW YORK, *Defendants.*

JUDGMENT

March 4, 1980

The Court having this day granted plaintiff's motion for summary judgment; it is

ORDERED, ADJUDGED, DECREED and DECLARED that the Long Island Railroad Company is a carrier within the meaning of the Interstate Commerce Act and the Railway Labor Act; that members of the United Transportation Union are subject to the limitations imposed upon them by the Railway Labor Act and entitled to the rights granted thereunder including the right of self-help upon the exhaustion of the mandatory provisions thereof; that New York Civil Service Law Sections 200 *et seq* (Taylor Law) infringe the rights granted under the Railway Labor Act and therefore are unenforceable as to members of United Transportation Union who are employed by the Long Island Railroad Company, and it is further

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and attorneys, and persons in active concert or participation with them shall not prosecute any proceeding or take any affirmative steps in any action now pending in any state court against United

Transportation Union based on an alleged violation of New York Civil Service Law Sections 200 *et seq* (Taylor Law) or institute any action against United Transportation Union in any state court based on alleged violation of said statute.

Pending determination of the appeal from the order and judgment entered herein, United Transportation Union, its officers, agents, servants, employees, and attorneys and persons acting in active concert or participation with them are enjoined and restrained from exercising the right of self-help and/or aiding, counselling or participating in any strike or strike action by any other labor organization against the Long Island Railroad Company.

Judgment entered accordingly this 4th day of March, 1980 at Brooklyn, New York.

/s/ RICHARD H. WEARE
Richard H. Weare,
Clerk of Court

Approved:

/s/ JACOB MISHLER
Jacob Mishler
U.S.D.J.

APPENDIX D

New York Taylor Law, New York Civil Service Law, §§210 And 211:

§210. Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration.

(a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.

(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.

(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the

basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation and the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

[Paragraph (f) has been repealed.]

(g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last

day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (c) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The

determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section, lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate govenment officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(c) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the

mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this article have been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

(h) No compensation shall be paid by the public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of subdivision two of section two hundred ten; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or cause to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

4. Within sixty days of the termination of a strike, the chief executive officer of the government involved shall

prepare and make public a report in writing, which shall contain the following information: (a) the circumstances surrounding the commencement of the strike, (b) the efforts used to terminate the strike, (c) the names of those public employees whom the public officer or body had reason to believe were responsible for causing, instigating or encouraging the strike and (d) related to the varying degrees of individual responsibility, the sanctions imposed or proceedings pending against each such individual public employee.

§211. Application for injunctive relief

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.

APPENDIX E

Railway Labor Act, 45 U.S.C. §151 and §151a:

§151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

§151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

APPENDIX F

Interstate Commerce Act, 49 U.S.C. §10501:

SUBCHAPTER I — RAIL, RAIL — WATER, EXPRESS, AND PIPELINE CARRIER TRANSPORTATION

§10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

APPENDIX G

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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8 NMB No. 89
File No. C-5045

IN THE MATTER OF
LONG ISLAND RAILROAD COMPANY
and
STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY

Interim Order
(March 9, 1981)

On September 22, 1980, the National Mediation Board ordered the Metropolitan Transportation Authority (MTA); and Long Island Rail Road (LIRR); and the Staten Island Rapid Transit Operating Authority (SIRTOA), constituent agencies of the MTA; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Railroad Signalmen; Brotherhood Railway Carmen of the United States and Canada; International Association of Machinists and Aerospace Workers; International Brotherhood of Electrical Workers; International Brotherhood of Boilermakers and Blacksmiths; International Brotherhood of Firemen and Oilers; International Brotherhood of Teamsters; Police Benevolent Association; Railroad Yardmasters of America; Sheet Metal Workers International Association and United Transportation Union, to show cause on or before November 17, 1980, why the National Mediation Board should not cease

to excercise jurisdiction over the LIRR and SIRTOA, as constituent agencies of MTA, in conformance with the September 15, 1980, decision of the United States Court of Appeals for the Second Circuit in *United Transportation Union* v. *Long Island Rail Road Company and Metropolitan Transportation Authority of New York*, 105 LRRM 2465 (2nd Cir. 1980).

NMB File No. C-5045 was assigned to this matter for purposes of identification.

BACKGROUND

On December 6, 1979, the United Transportation Union (UTC) filed suit in the United States District Court for the Eastern District of New York seeking, inter alia, a declaratory judgment that the relationship between the UTU and MTA was governed by the Railway Labor Act and that the employees could not be subjected to the sanctions contained in the Taylor Law, N.Y. Civ. Serv. Law §§200-214, in the event they engaged in "self-help" as allowed under the Railway Labor Act. On December 8, 1979, the mediatory provisions of the Railway Labor Act having been exhausted, the UTU employees went on strike. On December 14, 1979, President Carter established Emergency Board No. 192 and the employees returned to work. The cooling off provisions of section 10 expired on February 14, 1980.

On February 8, 1980, MTA voted to convert the Long Island Railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law.

The District Court in its decision on March 5, 1980, 103 LRRM 3069, found that:

> There are three major issues confronting us:
>
> (1) Is the railroad a 'carrier' subject to the Act;
>
> (2) If so, does the Act preempt the application of the Taylor Law to the railroad's employees;
>
> (3) If the Taylor Law may not be applied to bar a strike by the plaintiff's members, what is the appropriate relief.

The Court first found that the Long Island Rail Road was a carrier within the meaning of the Railway Labor Act. It then went on the discuss whether employees of the LIRR are free to resort to self-help permitted by the Railway Labor Act or the subject to the prohibition and penalties of the Taylor Law.

> While the issue is of extreme importance, we do not think that it would serve any useful purpose to embark on a lengthy discussion of the relationship between the pertinent federal and state legislation. We have only recently dealt with the identical issue in a remarkably analogous context. In *Brotherhood of Locomotive Engineers* v. *Staten Island Rapid Tranist Operating Authority* 100 LRRM 3154 (E.D.N.Y. 1979) we were asked to decide whether the Taylor Law could be applied to employees of another MTA subsidiary, the Staten Island Rapid Transit Operating Authority ("SIRTOA"). We held that if SIRTOA was subject to the [Railway Labor] Act its employees were free to engage in strike activities notwithstanding the fact that SIRTOA was a public benefit corporation whose employees were therefore subject to the Taylor Law's proscription of such conduct.

On September 15, 1980, the District Court decision was reversed by the Second Circuit. While agreeing with the District Court that the LIRR is a carrier subject to the Railway Labor Act, the Circuit Court found that this was only the beginning of its inquiry.

> If the LIRR was a privately owned carrier, the commerce clause regulation would prevail, and no further analysis would be required. The LIRR is a wholly owned subsidiary of a state agency, however, and appellants urge that even if the LIRR is subject to the literal terms of the RLA, that Act may not be enforced so as to allow a strike because it interferes with an integral state function, namely, the State's ability to structure employer-employee relationships in public commuter transportation.

* * *

> The inquiry is therefore essentially two-tiered. To determine whether MTA's operation of the LIRR falls within the sphere of protected state activity, we must first consider whether the operation of the railroad qualifies as a integral or traditional government function. If it does, the federal interest in regulating the collective bargaining relations of LIRR employees under the Railway Labor Act must be weighed against the State's interest in applying the Taylor Law.

The Court went on to weigh those interests as it saw them and concluded:

> In sum, we recognize that the LIRR would come under the literal terms of the RLA, see *California v. Taylor, supra,* and that the right to strike, free from state interference, has been held essential to that federal scheme, *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378-82 (1969). In the present context, however, the federal interest in preserving the right of LIRR employees if not "demonstrably greater" than New York State's interest in preventing LIRR strikes in order to ensure continuous passenger service for so many daily commuters. We reach this result with the realization that the determination of whether state or federal interests are paramount may be difficult to resolve in future cases. However, that diffioulty cannot preclude a conclusion required by the present circumstances and authorities.

Following the Second Circuit's decision, the UTU and various amici curiae requested that the court grant a rehearing or a rehearing en banc of the three-judge panel's decision. Determination of the issues raised by the Board's Order to Show Cause was held in abeyance pending the Court's ruling on that request. On December 17, 1980, the Second Circuit denied the request for a rehearing and advised that en banc rehearing would not be granted, thereby leaving the panel's

decision undisturbed. In view of these events, the Board finds as follows:

ISSUE

The issue is whether the NMB should refrain from exercising any or all of its statutory jurisdiction over the LIRR and SIRTOA, as constituent agencies of the MTA, in light of the decision of the Court of Appeals. That decision held, in essence, that the Railway Labor Act, 45 U.S.C. §151 et seq., and the New York State Taylor Lew, N.Y. Civ. Serv. Law §§200-214, both applied to collective bargaining on LIRR, and by implication to SIRTOA. The effect of that decision is that certain provisions of that Taylor Law either apply concurrently with or supercede provisions of the RLA.

CONTENTIONS

The MTA filed a response to the Board's Order to Show Cause on behalf of itself and LIRR and SIRTOA. It is the MTA's position that the Taylor Law, not the RLA, governs labor relations on LIRR and SIRTOA, and that the Second Circuit's decision "requires the end of the NMB's jurisdiction" over those carriers. MTA asserts that no part of the RLA applies to those carriers, and that the Taylor Law applies in its entirety.

The United Transportation Union (UTU) and International Association of Machinists and Aerospace Workers (IAM&AW) filed a joint response. These organizations assert that the Board should continue to exercise jurisdiction, at least until the litigation is terminated, because of the disruptive effects which would follow. UTU and IAM&AW further assert that the court found that LIRR was a carrier subject to the RLA, and that its decision is ambiguous.

The American Train Dispatchers Association (ATDA), International Brotherhood of Electrical Workers (IBEW), International Brotherhood of Firemen and Oilers (IBFO), Brotherhood Railway Carmen of the United States and Canada (BRC), Sheet Metal Workers International Associa-

tion (SMWIA) and International Brotherhood of Boilermakers and Blacksmiths (IBBB), filed a joint response. These organizations contend that the court's decision is inconsistent with established Supreme Court precedent and is based upon improper and incorrect interpretation of the mejor precedent relied upon. The organizations urge the Board not to cease exercising jurisdiction under the RLA.

The LIRR Patrolmen's Benevolent Association (PBA) urges the Board to maintain jurisdiction based upon the carriers' undisputed connection to interstate commerce, and the District Court decision overruled by the Second Circuit. In addition, it points to various other Federal laws applicable to the LIRR, and to litigation confirming SIRTOA's status as a carrier under the RLA.

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) filed a response asserting that the Second Circuit's decision cannot be a basis for withdrawal of the NMB's jurisdiction because it constitutes an unwarranted application of precedent and is susceptible of contradictory interpretations.

The Brotherhood of Locomotive Engineers (BLE), Brotherhood of Railroad Signalmen (BRS), and Railroad Yardmasters of America (RYA) filed a joint response asserting that the Board does not have the power to cease exercising its jurisdiction over LIRR and SIRTOA. These organizations also state that the court ruling only holds that LIRR and SIRTOA employees may not strike.

BRC filed an additional individual response contending that only the right to strike was superceded by the Taylor Law, and that the rest of the RLA is still applicable.

DISCUSSION

I.

It is clear that the Court of Appeals did not divest the NMB of jurisdiction over the LIRR in its decision, but rather

sought to balance Federal and state interests in the labor-management relations of the LIRR. Indeed, the court's opinion begins with the statement "The LIRR is a rail common carrier. . . ." The Board does not, therefore, view this case as one involving its jurisdiction over a carrier subject to the RLA. Rather, the Board finds that the only issue for its consideration is whether it should continue to exercise its jurisdiction in light of the court's holding that there is *concurrent* RLA-Taylor Law jurisdiction.

II.

The Board cannot, as urged by several of the organizations, ignore the decision of the Court of Appeals. Unless or until that decision is modified or overruled by the United States Supreme Court, this Board is bound by its holding.

The Court of Appeals has determined that, because the state interest as the employer of LIRR employees outweighs the Federal interest in the flow of interstate commerce, the Taylor Law antistrike provisions apply. Given this fact the NMB must determine what its mediatory responsibilities are under the Second Circuit's decision.

III

Mediation under the Railway Labor Act has a long history. It is founded on a theory of intensive and lengthy mediation with a termination stated in Section 5, First as follows:

> If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.
>
> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have

failed and for thirty days thereafter, unless in the intervening period the parties agree to arbftration, or an emergency board shall be created under Section 10 of this Act, no change ehall be made in rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

The statutory scheme is a comprehensive plan.[1] It's components cannot be segregated and still have meaning. The possibility of the Board's terminating its mediatory services, with the consequences which flow from such action, is as much a part of its mediatory process as anything else. Yet by superimposing the Taylor Law anti-strike prowfsions upon the Board's mediatory services, the Court destroys the only real power that this Board has to induce compromise and ultimate agreement by the parties. Without the uncertainty in collective bargaining created by the Railway Labor Act, mediation can just as easily be undertaken by State mediators. And, in fact, considering local conditions, perhaps local mediators may be

---

[1] This machinery was succinctly described by Justice Harlan in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, (1969):

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. [Section] 6. The parties must confer, [Section] 2 Second, and if conference faile to resolve the dispute, either or both may invoke the services of the National Mediation Board; which may also proffer its services *sua sponte* if it finds a labor emergency to exist. [Section] 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding artibration, which can take place, however, only if both consent. [Section]55 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportion service, the Mediation Board shall notify the President', who may create an emergency board to investigate and report on the dispute. [Section] 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. [Section] 2 Seventh, 5 First, 6, 10."

more in tune with the news of the state officials who now, under the Second Circuit decision, obviously are in complete control of the negotiations.

It therefore seems that in this era of fiscal restraint and transfer of state functions back to the states that the NMB should allow the state of New York the opportunity to solve what the Court finds to be primarily a state problem.

IV.

In its brief, MTA has taken the position that the Taylor Law, not the Railway Labor Act, governs labor relations on the LIRR and SIRTOA. We are unable to read such a broad conclusion into the Court's decision. While such a reading is possible, this contention was not raised before both courts that heard the cases. Furthermore, the courts gave no indication that there has been any consideration of the other functions mandated by the Railway Labor Act; i.e., the choosing of collective bargaining representatives and the settlement of minor disputes (grievances).[2]

What is clear is that in its decision, the Second Circuit was examining the mediatory functions of the Railway Labor Act and its possible interplay with the Taylor Law. There is no indication that the Court intended to change representation rights or grievance and arbitration procedures for these MTA employees. Accordingly, we find no reason to cede our undoubted jurisdiction in the representation area or the area of the settlement of minor disputes.

---

[2] The Board is requried, under Section 2, Ninth, to investigate representation disputes and certify who are the representatives of employees in a craft or class, utilizing a secret ballot or other appropriate means of ascertaining the choice of the majority of the employees in the craft or class. Section 3 of the Act establishes procedures for the arbitration of grievances or disputes over the interpretation or application of collective bargaining agreements in the railroad industry.

V.

Finally, we should note that deferral to the exercise of state jurisdiction in labor relations matters where concurrent jurisdiction exists would also further the Congressional policy. A recent report of the General Accounting Office, "The Federal Mediation and Conciliation Service Should Strive to Avoid Mediating Minor Disputes", (HRD-81-14, October 3n, 1980), criticized FMCS for mediating labor disputes in states having adequate state mediation services, and for failing to assess the impact of the dispute on interstate commerce prior to asserting jurisdiction. In addition, the report questioned the legality of FMCS's mediation of state and local government employee disputes.

New York State has adequate mediatory services available. Statutory differences between NMB jurisdiction and FMCS jurisdiction make it clear that the RLA covers LIRR and SIRTOA whether their employees are state government employees or not. However, with respect to the assessment of a dispute's impact on interstate commerce, the Court of Appeals has ruled that the state's interests as an employer outweigh any Federal interest in interstate commerce.

Under these circumstances, we are confident that GAO would find that the use of Federal resources is not warranted in a state which provides comparable labor relations machinery.

CONCLUSION

LIRR and SIRTOA are "carriers" within the meaning of Section 1, First, of the Railway Labor Act. The right of the NMB to exercise jurisdiction over these carriers has not been altered by the Court of Appeals decision in *UTU* v. *LIRR*. However, unless and until the U.S. Supreme Court modifies or reverses the Court of Appeals, this Board is bound by the determination of that Court that the interests of the State of New York outweigh those of the Federal government, and that the RLA does not pre-empt application of the Taylor

Law to the carriers and their employees under the Supremacy clause and Commerce clause of the U.S. Constitution.

Accordingly, the National Mediation Board has determined that it is not in the Federal interest to expend Federal funds where the same services are provided by a state. The Board will immediately cease processing applications for mediation services on any carriers owned by the MTA. Cases presently docketed are hereby suspended. This determination may be reviewed following any action by the Supreme Court with respect to the Court of Appeals decision.

By direction of the National Mediation Board.

/s/ ROWLAND K. QUINN
Rowland K. Quinn, Jr.
Executive Secretary

Copies to:

Mr. Richard Ravitch, Chairman
Metropolitan Transportation Authority

Mr. John D. Simpson, Executive Director
Metropolitan Transportation Authority

Mr. Daniel Scannell, Acting President
& General Manager
Long Island Rail Road Company

Mr. James J. Miller
Chief Personnel Officer
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Mr. E. A. Duszak, General Superintendent
Staten Island Rapid Transit Operation Authority

Mr. B. C. Hilbert, President
American Train Dispatchers Association

Mr. John F. Sytsma, President
Brotherhood of Locomotive Engineers

Mr. Fred J. Kroll, Int'l President
Brotherhood of Railway, Airline and
Steamship Clerks

Mr. Frank Ferlin, President
American Railway Supervisors Association
Division-BRAC

Mr. R. T. Bates, President
Brotherhood of Railroad Signalmen

Mr. O. W. Jacobson, General President
Brotherhood Railway Carmen of the U.S.
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Mr. W. W. Winpisinger, Int'l President
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Mr. A. M. Ripp, Int'l Vice President
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Mr. Harold J. Buoy, President
International Brotherhood of Boilermakers and
Blacksmiths

Mr. J. J. McNamara, President
International Brotherhood of Firemen and Oilers

Mr. Norman Greene, Director
National Airline Division
International Bnotherhood of Teamsters

Mr. Michel Matthaei, President
Police Benevolent Association

Mr. R. E. Martin, General Vice President
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Honorable Harold Newman, Chairman
Honorable Ida Klaus, Member
Honorable David Randles, Member
New York State Public Employment Relations Board

RKQ/dca

APPENDIX H

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205

February 26, 1981

Robert McCullough, Esq.
1050 17th Street NW
Suite 701
Washington, D.C. 20036

Dear Mr. McCullough:

In response to your recent request for certain information regarding PERB's mediation and strike experience from September 1967 to December 31, 1980, the following represents what we are able to provide at this time:

PERB has received 9,476 impasses during that period. We are unable to tabulate the number involving transit employees.

During that period there have been 279 strikes with an estimated 4,105,000 worker days idle. There have been 9 transit strikes with an estimated 370,500 work days idle during that period. It should be noted that the single strike of the TWU in New York last year involved an estimated 360,000 work days idle.

We do not know the number of cases, if any, in which written agreement was made not to bring contempt proceedings nor do we know the number of such proceedings brought. We do know of 53 strikes in which unions have been held in contempt of court including 4 transit strikes where unions were held in contempt.

Very truly yours,

/s/ MARTIN L. BARR
Martin L. Barr
Counsel

MLB/mk

APPENDIX I

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

March 31, 1981

Mr. Robert McCullough
Suite 701
1050 K Street, N.W.
Washington, DC 20036

Dear Mr. McCullough:

In response to your telephone request of February 17, 1981, to Mr. Ronald Etters of my staff, I am pleased to provide you the statistical information you required.

Sincerely,

/s/ ROWLAND K. QUINN, JR.
Rowland K. Quinn, Jr.
Executive Secretary

- enclosures -

RKQ/sks

EMERGENCY BOARDS — LONG ISLAND RAIL ROAD — FY 1965 — FY 1980

E.B. 170 (NMB Case Nos. A-7970; E-322)	Brotherhood of Railroad Trainmen International Brotherhood of Electrical Workers International Association of Machinists & Aerospace Workers created by Executive Order 11343 issued April 12, 1967.
E.B. 173 (NMB Case No. E-346)	United Transportation Union (BRT) created by Executive Order 11442 issued December 27, 1968.
E.B. 182 (NMB Case No. A-9167)	Non-Operating Employees Conference Committee created by Executive Order 11679 issued August 19, 1972.
E.B. 184 (NMB Case No. A-9200)	Brotherhood of Railroad Signalmen created by Executive Order 11745 issued November 1, 1973.
E.B. 192 (11 "A" cases)	7 unions involved created by Executive Order 12182 issued December 14, 1979.

STRIKES AT THE LONG ISLAND RAIL ROAD, FY1965 — FY 1980

Case No.	Union	Number of Em'ees	Date Began	Date Ended	Days Duration
A-9167	Non-Operating Employees Conference Committee	5,000	11/30/72	1/18/73	50
A-10456, A-10489	BRS	4,000	12/8/79 and 4/1/80	12/14/79 and 4/3/80	6 2
A-10441	RYA	" "	" "	" "	" "
A-10434, A-10512	IBT	" "	" "	" "	" "
A-10412, A-10527	BRC	" "	" "	" "	" "
A-10442	UTU	" "	" "	" "	" "
A-10457, A-10493	BLE	" "	" "	" "	" "
A-10472	PBA	" "	" "	" "	" "

MEDIATION CASES CLOSED ON THE LONG ISLAND RAIL ROAD, FY 1965 — FY 1980

FY 1965	—
1966	—
1967	2
1968	4
1969	—
1970	—
1971	2
1972	—
1973	1
1974	2
1975	6
1976	1
1977	—
1978	20
1979	—
1980	21
TOTAL	59

APPENDIX J

CONSTITUTIONAL PROVISIONS

The Constitution of the United States of America provides in pertinent part:

Article I, Section 8:

> The Congress shall have the Power. . . .
>
> * * *
>
> To regulate Commerce . . . among the several States. . . .
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the Foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.